Supreme Court, U.S.
FILED

No. 03 232 AUG 11 2003

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In The

Supreme Court of the United States

BAY OCEAN MANAGEMENT, INC.,

Petitioner,

versus

STEEL COILS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Carriage of Goods by Sea Act (COGSA) provide the exclusive remedy for cargo damage against the vessel and its manager?

2. How can the vessel's manager be held liable in tort for cargo damage for failure to exercise due diligence to make the vessel seaworthy, and the carrier can be found liable on exactly the same basis under COGSA, but the latter has the protection of the COGSA defenses including the package limit and the former does not?

3. There is a split in the Circuits as to whether COGSA is the exclusive remedy in a cargo damage case or whether a vessel's manager can be sued in tort outside the confines of COGSA thereby depriving such manager of any COGSA defenses. Should this Court grant certiorari to resolve this conflict and to provide guidance in this area of the law?

LIST OF PARTIES

The following are the parties to this proceeding:

1. Steel Coils, Inc.
   Plaintiff-Respondent

2. M/V LAKE MARION, Inc., *in rem*
   Defendant

3. Lake Marion, Inc., *in personam*
   Defendant

4. Bay Ocean Management, Inc.
   Defendant-Petitioner

5. Western Bulk Carriers K/S Oslo
   Defendant-Third Party Plaintiff

6. Itochu International, Inc.
   Third Party Defendant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner, Bay Ocean Management, Inc., states that it has no parent corporation or that any publicly held company owns more than 10% of its stock.

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DECISIONS BELOW

The ruling of the United States Court of Appeals for the Fifth Circuit in *Steel Coils, Inc. v. M/V LAKE MARION, et al.,* No. 02-30006 entered May 13, 2003, is reported at 331 F.3d 422 (5th Cir. 2003) and reproduced in Appendix A (App. 1-33).

The Order and Reasons of the United States District Court for the Eastern District of Louisiana is reported *sub nom Steel Coils, Inc. v. M/V LAKE MARION, et al.,* 2002 AMC 1680 (E.D. La. 2001) and is reproduced in Appendix B (App. 34-69). The District Court's Judgment is reproduced in Appendix C (App. 70-71).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on May 13, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are contained within the Carriage of Goods by Sea Act, 46 U.S.C. App. § 1300 *et seq.*, hereinafter referred to as "COGSA." The relevant sections are the following:

§ 1301. Definitions

When used in this chapter –

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

* * *

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

§ 1303. Responsibilities and liabilities of carrier and ship Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to –

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

* * *

§ 1304. Rights and immunities of carrier and ship Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –

> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

* * *

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in

other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

STATEMENT OF THE CASE

This case, involving a claim for cargo damage, arises out of a voyage undertaken by the M/V LAKE MARION in 1997, during which the vessel carried steel products from ports in the Baltic Sea to ports in the United States. At the relevant time, the vessel's registered owner was Lake Marion, Inc. ("LMI"), a so-called "one ship" company. Because this latter entity had no employees, its affairs were necessarily managed by another corporate entity, namely Bay Ocean Management, Inc. ("Bay Ocean"), based in New Jersey, whose employees actually ran the ship's business on a day-to-day basis. Bay Ocean also employed the Master and crew who navigated and maintained the vessel itself. Bay Ocean fulfilled this function for a number of ships in its fleet. In the present day shipping business, most fleets are managed in this fashion.

For this particular voyage, Bay Ocean arranged a time charter of the vessel to Western Bulk Carriers K/S Oslo ("Western Bulk"), who in turn voyage chartered the vessel to Itochu International, Inc. ("Itochu"). A bill of lading was issued covering the cargo that was consigned to Steel Coils, Inc. ("Steel Coils"). Because the cargo of steel arrived rusty, Steel Coils filed suit in the usual manner against (1) the vessel *in rem*, (2) the registered owner, LMI, (3) the latter's manager, Bay Ocean, and (4) the time

charterer, Western Bulk. Western Bulk in turn filed a third party complaint against Itochu. The cause of action against the vessel and its owner were based on a breach of the COGSA obligations, but the claim against the manager was framed in tort.

Part of the pretrial skirmishing involved the application of the COGSA $500 per package limit. See 46 U.S.C. App. § 1304(5). Plaintiff Steel Coils took the position, opposed by defendants, that the package limit did not apply because of a lack of "fair opportunity" to declare a higher value.[1] After discovery was commenced, but not completed, the Magistrate Judge assigned to the case, under the guise of aiding settlement negotiations, recommended the filing of a motion for partial summary judgment by defendants on the package limitation issue. The motion was duly filed, but was denied. Thereafter further motion practice followed because the District Court's ruling has misguidedly foreclosed any further discovery on the "fair opportunity" issue as it related to the package limitation. Thereafter, plaintiff filed its own motion for partial summary judgment on the package limitation issue, which was granted over the strenuous protests of the defendants, based on their inability to conduct the proper discovery because of the District Court's earlier Order. The District Court also denied a motion to stay the proceedings and certify the issue for appeal.

Further pretrial discovery took place, and evidence surfaced showing that plaintiff had in fact been given a

[1] See the District Court's analysis of the "fair opportunity" doctrine at Appendix B, App. 52-54.

"fair opportunity" to declare a higher value, so triggering the package limitation. As a result, defendants filed a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure as part of their pretrial submissions urging the court to change its summary judgment rulings, based on the new evidence.

The case was duly tried. Subsequently, the District Court issued its Order and Reasons pursuant to which although plaintiff prevailed on its cargo claim, defendants' FRCP Rule 60 motion regarding the COGSA package limitation was granted. This latter ruling was based on a finding that Itochu had acted as the agent of Steel Coils when entering into the contract of carriage. The court found that the contract of carriage was evidenced by the voyage charter party rather than the bill of lading. Because the former document incorporated a reference to COGSA, the $500 package limit did apply. However, the District Court differentiated between the vessel and its owner on the one hand, and the manager on the other, in the application of the COGSA defenses and in particular the package limit, even though the factual basis for the liability finding was the same. The manager Bay Ocean was found liable in tort because it was negligent in its maintenance of the vessel's hatch covers and because the crew failed to perform the usual hose tests on the covers to ensure that they functioned properly. The District Court found separately that in accordance with COGSA's requirements in § 1303, the carriers, *i.e.* the vessel and its owner LMI, failed to exercise due diligence to ensure the seaworthiness of the vessel before the commencement of the voyage. This finding was also based on the failure to test the watertight integrity of the hatch covers and to maintain and repair them. However, because of the

differentiation between the causes of action against the owner and the manager, the judgment against the owner was reduced by the application of the COGSA package limitation and was framed in terms of the number of packages damaged multiplied by the $500 per package limit. Yet, the judgment against the manager was not subject to the package limitation and was for the full amount of the claim.

Bay Ocean appealed to the United States Court of Appeals for the Fifth Circuit on the basis that suing the vessel's manager in tort was simply a mechanism used to circumvent the provisions of COGSA. The Fifth Circuit, however, affirmed the District Court's judgment that the vessel's manager, Bay Ocean, could be held liable in tort for its negligence separate from the COGSA claim, and found Bay Ocean liable for the entire amount of the claim because they were not entitled to the benefit of COGSA's $500 per package limitation. Because Bay Ocean believes that this is an incorrect application of the law, and that another Circuit sees COGSA as the exclusive remedy in cases such as this, Bay Ocean seeks a Writ of Certiorari from this Honorable Court to decide this important issue of maritime law.

REASONS FOR GRANTING THE WRIT

COGSA was enacted in 1936. The way in which the shipping industry operates has changed substantially since that time. Nowadays, each ship that is part of a "fleet" is usually owned by a separate one-ship company, but all the vessels in the fleet are operated and managed by a common vessel management company. Thus, it is fair

to say that for any particular voyage undertaken by a vessel in the fleet, all the COGSA obligations are, as a practical matter, carried out by the vessel manager and its employees, including the crew. The irony is that the vessel manager is basically the *only* entity carrying out the COGSA obligations. The Fifth Circuit's ruling changes the face of cargo claim litigation by rendering COGSA irrelevant and ineffective. If the vessel's manager is not covered by COGSA, an aggrieved cargo plaintiff need only sue the vessel's manager in tort, and because of the manager's operational role, that manager can be found liable for a breach of the COGSA obligations, but will have none of the defenses.

The Fifth Circuit took great pains to affirm the existence of a separate tort action, outside the confines of COGSA, in cargo damage cases such as these. However, the Eleventh Circuit in *Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Co., Ltd.*, 215 F.3d 1217 (11th Cir. 2000) has decided that because COGSA applied to the plaintiff's cargo damage claims on a voyage into the United States, it was plaintiff's "exclusive remedy" and preempted plaintiff's tort claims. In that case, because plaintiff was not a party to the bill of lading, it sought to use the device of a tort claim in much the same way as Bay Ocean is being exposed to a tort claim because it was not a party to the voyage charter. Although not exactly the same fact situation was present in that case as is present here, the different philosophies amongst the Circuits is readily apparent. In an earlier decision, the Eleventh Circuit did not differentiate between the status of the owner and manager defendants in a COGSA case. See, *Hayes-Leger Assocs., Inc. v. M/V ORIENTAL KNIGHT*, 765 F.2d 1076, 1078 (11th Cir. 1985). It is Bay Ocean's

request that this Court grant the Writ because of the impact of the Fifth Circuit's opinion on the way in which the modern shipping industry conducts its business, and in particular on the now ubiquitous vessel manager.

The Fifth Circuit's reasoning in reaching its conclusion was very straightforward. Bay Ocean was not a COGSA carrier and therefore could not rely on any of COGSA's terms. Rather, it was an agent of the carrier and therefore came within the ambit of this Court's decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 79 S. Ct. 766 (1959), pursuant to which a negligent stevedore was denied the protection of the COGSA package limitation defense. The Fifth Circuit went on to note that the Second Circuit's decision in *Citrus Marketing Board of Israel v. J. Lauritzen A/S*, 943 F.2d 220 (2nd Cir. 1991) was a similar case wherein the court held that a plaintiff may sue a ship's manager in tort for damage to cargo and that COGSA does not govern such an action. Bay Ocean takes issue with this reasoning on a number of grounds.

At the outset, Bay Ocean submits that the language of COGSA should be interpreted to cover the very entity that complies with its obligations. The definition of a "carrier" in § 1301(a) "includes the owner or charterer who enters into a contract of carriage with a shipper." Not to be facetious, but the question then becomes what the word "include" includes. The language is not expressly exclusive, and implies that there may be other entities that fit within the definition. Bay Ocean submits that the definition should be read as inclusive rather than excluding every other entity other than an owner or charterer. It should, it is respectfully submitted, be read to include those entities actually fulfilling the statute's obligations.

In fact, in this case, even though both the District Court and the Fifth Circuit assumed that LMI was a COGSA carrier, the latter was not a party to the voyage charter that was found to be the applicable contract of carriage. LMI, as registered owner of the vessel had time chartered it to Western Bulk, and the voyage charter was entered into by Western Bulk and Itochu. LMI could not enter into a time charter without the assistance of its manager Bay Ocean, and the contract so states.[2] Technically therefore, LMI, as the owner of the vessel, was not a party to the contract of carriage *i.e.*, the voyage charterer, but they were nevertheless treated as a COGSA carrier as a matter of course.

The situation described above fits very well into the ideas expressed in the section of COGSA that immediately follows the definitions. Section 1302 imposes duties and rights upon the carrier "in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods." As stated above, the irony of this situation is that it is really only the vessel manager and its employees *i.e.*, the Master and crew, that prepare the vessel for the voyage. In reality, no one else is responsible for making the vessel seaworthy at the commencement of the voyage and that is why it was so easy for the District Court to find them at fault in this endeavor.

The language in § 1304 also leads to a conclusion that COGSA should be read more expansively. In setting forth

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[2] The time charter describes the owners of the vessel as "Lake Marion, Inc. – Manager is: Bay Ocean Management, Inc."

the rights and immunities as they relate to unseaworthiness, the Act states that burden of proving the exercise of due diligence "shall be on the carrier *or other persons* claiming exemption under this section." (Emphasis added). The inclusion of the words "or other persons" must infer that other entities are covered by the Act.

The exclusion of the vessel's manager from the ambit of COGSA also creates a dilemma in the interpretation of one of the seventeen "uncontrollable causes of loss" listed in the Act. The very first listed exemption from liability in § 1304(2) relates to the neglect or default of the Master or the servants of the carrier "in the navigation or in the management of the ship." This so called "error in management" defense created a dilemma that the Second Circuit in *Citrus Marketing Board of Israel*, *supra*, did not wish to address. *Id.* at p. 224. The dilemma is real however, and should be resolved by bringing the manager within the ambit of the Act.

Bay Ocean also takes issue with the Fifth Circuit's almost automatic refusal to extend the protection of the package limitation to the vessel's manager based on this Court's decision relating to a stevedore in *Herd*. It should be noted that this Court in *Herd* relied on the Australian case of *Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd.*, (1956) 1 LL. L.Rep. 346, (1956) Argus Law Rep. 311, 29 Austral. LJ 740, and quoted with approval at 79 S. Ct. 772, the passage from the case that begins with the sentence that reads:

> The stevedore is a *complete stranger* to the contract of carriage and it is of no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. (Emphasis added).

In this case, Bay Ocean can hardly be said to be a complete stranger to the contract of carriage. Bay Ocean realizes that there is an element of relativity, or degrees of separation, when discussing the difference between a stevedore and a vessel manager in relation to their proximity to the vessel owner's obligations. It must be conceded, it is submitted, that the vessel manager is much more intimately related to the vessel owner than is an independent stevedore. In every day commerce the practicalities are that the vessel manager is the personification of the registered owner, and because the owner can only enter into contracts under the auspices of the manager, such a manager is definitely not a complete stranger to any activity, practical or legal, that the owner undertakes. As emphasized above, it is the manager that must undertake to fulfill the duties imposed by COGSA with regard to the seaworthiness of the vessel. In contrast, there are no COGSA duties regarding making the vessel seaworthy on a party such as an independent stevedore.

In light of the Fifth Circuit's classification of the manager as an agent, the question is necessarily raised as to whether this whole polemic can be obviated by the inclusion of a so-called Himalaya Clause in the contract of carriage.[3] The problem with such a "band-aid" approach is

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[3] The Himalaya Clause included in the bill of lading in *Citrus Marketing* provided:

> *Benefit to Third Parties.* Every agent or employee of the Carrier or Shipowner and every independent contractor who performs any part of the services provided by the Carrier or Shipowner, including the vessel's officers and crew, stevedores, shore side employees, draymen, crane and other machinery operators, shall have the same rights, privileges,

(Continued on following page)

that it always foments more litigation as to whether the Clause covers the intended recipient, and if so, for what.[4] Moreover, the protections afforded by such a clause may be interpreted as including only some of the COGSA defenses and not others.[5] The interpretation of such clauses is always subject to this Court's own admonition in *Herd*[6] that contracts purporting to grant limitation of liability must be strictly construed and limited to their intended beneficiaries.[7] The true answer to the question is that it may or it may not assist a manager to include a Himalaya Clause, whereas including the party who fulfils the COGSA obligations within the ambit of the Act makes more sense.

Moreover a more practical concern is at issue – the way in which stevedoring or other such services are engaged and how such charges are now allocated in

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> limitations of liability[,] immunities and powers provided for the Carrier by this contract by [COGSA], or by any other statute or regulation, the foregoing contract provisions being made by the Carrier and Shipowner for the benefit of all other persons and parties performing services in respect of loading, handling, stowing, carrying, keeping, caring for, discharging, and delivering the Goods or otherwise.

Id. at p. 221.

[4] See for example, *EAC Timerlane v. Pisces, Ltd.*, 745 F.2d 715, 718 and n. 5 (1st Cir. 1984).

[5] See, *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 373, 375 (9th Cir. 1974), denying the right to extend the "error in management" defense (COGSA § 1304(2)(a)) but allowing the same party to take advantage of the one year statute of limitations (COGSA § 1303(6)).

[6] *Id.* 356 U.S. at 305.

[7] See, *James N. Kirby, Pty. Ltd. v. Norfolk Southern Ry. Co.*, 300 F.3d 1300, 1307 (11th Cir. 2002).

modern shipping practice. Nowadays, stevedores at the load port are much more likely to be employed, instructed and paid for by the shipper, as they were in this case, rather than the carrier; for the carrier to extend a protection to a stevedore under those circumstances also makes little sense. In the past, when the shipowners carried out the entire transportation function there was some logic to extending the carrier's protections to the stevedore, but with multiple charters and with shippers and receivers employing the stevedores the same logic is no longer viable.

With regard to the conceptual difference between a COGSA cargo claiming sounding in tort, and a tort claim for cargo damage against a non-carrier, the Fifth Circuit took great pains to explain its position in a lengthy footnote[8]. This conceptual debate arose out of the Court's own language in *Associated Metals and Minerals Corporation v. M/V ALEXANDER'S UNITY*, 41 F.3d 1007 (5th Cir. 1995). That case involved lien rankings, and because maritime law ranks tort claims ahead of contract claims in a concursus, it is obviously advantageous to cargo claimants to classify their claims as tort claims. Nobody seems to doubt the proposition that a COGSA cargo claim can be pleaded so as to sound in tort. Likewise, there seems to be no doubt that even if the claim sounds in tort, the COGSA defenses are available to the defendant carrier. The point that the Fifth Circuit's meticulous conceptual differentiation misses is that the plaintiff is suing the manager in tort for a breach of what are COGSA obligations, carried

[8] See Appendix A, App. 31.

out by the only entity charged with fulfilling those obligations as a practical matter, but is depriving the manager of the *quid pro quo*. That is why the Eleventh Circuit's "exclusive remedy" application of the law makes more sense, it is respectfully submitted.

CONCLUSION

Since this Court's decision in 1959 in *Herd*, the shipping industry has undergone significant changes. One of these changes is the way in which vessel fleets are managed. The vessel manager now actually carries out the functions usually associated with ownership, and as a practical matter is the party that complies with the obligations of the carrier prescribed by COGSA. Under the circumstances, it is submitted that the manager should be entitled to take advantage of the COGSA defenses, including the package limitation. It is therefore submitted that in cargo damage cases such as these, COGSA should encompass the exclusive remedy against the vessel

manager, and the Act should be interpreted to include the vessel manager within its ambit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES
COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-30006

STEEL COILS, INC.,

Plaintiff-Appellee-Cross-Appellant,

versus

M/V LAKE MARION, her engines, boilers, etc., *in rem*; LAKE MARION, INC.; and BAY OCEAN MANAGEMENT, INC., *in personam*,

Defendants-Appellants-Cross-Appellees,

versus

WESTERN BULK CARRIERS K/S OSLO,

Defendant-Third Party Plaintiff-Appellant-Cross-Appellee,

versus

ITOCHU INTERNATIONAL, INC.,

Third Party Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed May 13, 2003)

Before HIGGINBOTHAM, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is a Carriage of Goods by Sea Act[1] claim for rust damage to steel coils which their owner alleges was caused by seawater when shipped from Latvia to the United States on the M/V Lake Marion. The district court awarded damages against the vessel, its owner, Lake Marion, Inc., its manager, Bay Ocean Management, Inc., collectively the "vessel interests," and the time charterer, Western Bulk Carriers K/S Oslo. Finding no error, we affirm.

I.

The plaintiff, Steel Coils, Inc., is an importer of steel products with its principal office in Deerfield, Illinois. It ordered flat-rolled steel from a steel mill in Russia. Itochu, which then owned ninety percent of the stock of Steel Coils, purchased the steel and entered into a voyage charter with Western Bulk for the M/V Lake Marion to import the steel to the United States.[2] Western Bulk had time chartered the vessel from Lake Marion, Inc.[3] As Lake Marion, Inc.'s manager, Bay Ocean employed the master and crew of the vessel.

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[1] 46 U.S.C. App. § 1300 *et seq.*

[2] "A voyage charter is a contract for the hire of a vessel for one or a series of voyages. . . . " *Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S,* 943 F.2d 220, 221 n.3 (2d Cir. 1991) (internal quotation marks omitted).

[3] "A time charter is a contract to use a vessel for a particular period of time, although the vessel owner retains possession and control." *Id.* at 221 n.2 (internal quotation marks omitted).

The Lake Marion took on the steel coils at the Latvian port of Riga between February 26 and March 2, 1997. The steel had traveled to port by rail from the Severstal steel mill 400 miles north of Moscow. At Riga, the hot rolled coils were stored outside, while the cold rolled and galvanized coils were encased in protective steel wrappers and stored in a warehouse at the port.[4]

After departing Riga, the vessel stopped at another Latvian port, Ventspils, where it took on more steel coils.[5] The ship departed Ventspils on March 7, 1997 and arrived at Camden, New Jersey, on March 28, 1997. After Camden, the ship stopped at New Orleans and Houston. Steel Coils alleged that the coils unloaded at New Orleans and Houston were damaged by saltwater, which required Steel Coils to have the cargo cleaned and recoated.

II.

Steel Coils filed suit under COGSA[6] against the M/V Lake Marion *in rem* and against Lake Marion, Inc., Bay Ocean Management, and Western Bulk Carriers *in personam,* requesting $550,000 in damages, with a separate claim of negligence against Bay Ocean. The vessel interests and Western Bulk filed cross-claims against each other for indemnification, and Western Bulk filed a third party complaint for indemnification against Itochu.

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[4] Evidence at trial showed that cold rolled and galvanized coils are susceptible to corrosion if exposed to any type of moisture, while hot rolled coils corrode only if exposed to saltwater.

[5] These coils are not the subject of the present suit.

[6] 46 U.S.C. App. § 1300 *et seq.*

After a bench trial, the district court held the defendants jointly and severally liable to Steel Coils for $262,000, and Bay Ocean liable for an additional $243,358.94. The court further found that Western Bulk was entitled to indemnity from Lake Marion, Inc. for any amount it pays to Steel Coils. It dismissed with prejudice Lake Marion's cross-claim against Western Bulk and Western Bulk's third party complaint against Itochu. From this judgment the vessel interests appeal, and Steel Coils and Western Bulk cross-appeal. Steel Coils's and Western Bulk's cross-appeals become relevant only if we find the vessel interests' points of error meritorious.

III.

Defendants M/V Lake Marion, Lake Marion, Inc., and Bay Ocean contend that the district court improperly shifted the burden to them to prove that the steel cargo was not in good condition prior to loading or was in undamaged condition at discharge, that it erred in finding that they failed to exercise due diligence to ensure that the vessel was seaworthy at the commencement of the voyage, and that it was wrong in disregarding their defenses to COGSA liability of peril of the sea and latent defect. They also assert the district court should not have held Bay Ocean liable to Steel Coils in tort separate from the COGSA claim, depriving Bay Ocean of the COGSA $500-per-package limitation on damages. We find these arguments unavailing.

IV.

In admiralty cases tried by the district court without a jury, we review the district court's legal conclusions *de*

novo, and its factual findings under the clearly erroneous standard.[7] "The clearly erroneous standard of review does not apply to decisions made by district court judges when they apply legal principles to essentially undisputed facts."[8]

COGSA provides a complex burden-shifting procedure. Initially, the plaintiff must establish a prima facie case by demonstrating that the cargo was loaded in an undamaged condition and discharged in a damaged condition.[9] "For the purpose of determining the condition of the goods at the time of receipt by the carrier, the bill of lading serves as prima facie evidence that the goods were loaded in the condition therein described."[10] If the plaintiff presents a prima facie case, the burden shifts to the defendants to prove that they exercised due diligence to prevent the damage or that the damage was caused by one of the exceptions set forth in section 1304(2) of COGSA, including "[p]erils, dangers, and accidents of the sea or other navigable waters" and "[l]atent defects not discoverable by due diligence."[11] If the defendants show that the loss was caused by one of these exceptions, the burden returns to the shipper to establish that the defendants' negligence contributed to the damage.[12] Finally, "if the shipper is able

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[7] *Sabah Shipyard Sdn. Bhd. v. M/V Harbel Tapper,* 178 F.3d 400, 404 (5th Cir. 1999).

[8] *Id.* (internal quotation marks omitted).

[9] *Tubacex, Inc. v. M/V RISAN,* 45 F.3d 951, 954 (5th Cir. 1995).

[10] *Id.*

[11] 46 U.S.C. App. § 1304(2).

[12] *Tubacex,* 45 F.3d at 954. This is true except for defendants who argue the peril of the sea defense under section 1304(2)(c) of COGSA. "[I]n order to establish an exception under this clause, the ship would

(Continued on following page)

to establish that the [defendants'] negligence was a contributory cause of the damage, the burden switches back to the [defendants] to segregate the portion of the damage due to the excepted cause from that portion resulting from the carrier's own negligence."[13]

A.

The vessel interests first assert that the district court reversed the burden of proof, requiring them to demonstrate that the goods were loaded in a damaged condition or were unloaded in an undamaged condition instead of requiring Steel Coils to prove that the coils were loaded undamaged and discharged damaged. These defendants mischaracterize the district court's decision. The district court properly explained that under COGSA a plaintiff must establish a prima facie case by "proving that the cargo for which the bills of lading were issued was loaded in an undamaged condition, and discharged in a damaged condition." Applying this law the trial court determined that Steel Coils demonstrated its prima facie case by proving that "the cargo was delivered to the LAKE MARION in good order and condition" and "was unloaded at the ports of New Orleans and Houston in a damaged condition."

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have to establish freedom from negligence" as well as prove that rough weather encountered on the voyage was a sea peril. *J. Gerber & Co. v. S.S. Sabine Howaldt,* 437 F.2d 580, 588-89 (2d Cir. 1971) (internal quotation marks omitted).

[13] *Tubacex,* 45 F.3d at 954.

The district court cited specific evidence proffered by Steel Coils to support these conclusions. In determining that the coils were loaded in good condition, it examined "mates receipts, bills of lading containing comments on the condition of the cargo, and a cargo survey taken at the load port in Riga that contained commentary about and photographs of the cargo." It explained that although some of these documents contained notations regarding "atmospheric rust on the hot rolled coils and damage to the wrapping of the cold rolled and galvanized coils," the evidence showed that "these conditions did not damage the coils" and were not the result of exposure to seawater prior to embarkation.

In looking at the evidence of the coils' unloading, the court found that "[a]ll of the surveyors at the discharge ports testified that the cargo was damaged when it was discharged . . . and their survey reports support their testimony." Moreover, relying on these surveyors' reports, as well as those of chemists who tested the rust on the coils, the court concluded that the rust damage was a result of seawater contamination. The trial court affirmatively rejected the testimony of the defendants' expert, Sanchez, who testified that the cargo was not contaminated by seawater.

The trial court correctly placed the burden upon Steel Coils to prove a prima facie case and examined the evidence to determine whether in fact this had been done. Although the vessel interests couch their complained-of error as improper burden shifting, their argument attacks the district court's factual findings that the cargo was undamaged before loading and damaged at unloading. They assert that the district court wrongly determined the coils were undamaged at loading because the bills of

lading noted that the hot rolled coils were rust stained and wet and noted that the condition of the cold rolled and galvanized steel coils, which were encased in steel wrappers, was unknown. They also argue that the district court did not rely on competent evidence in determining that the cargo was damaged at discharge.

The district court found from the evidence presented that the notations on the bills of lading indicating rust staining and moisture on the hot rolled coils did not affect their good condition prior to loading. Evidence in the record supports this conclusion. Captain Sparks, Steel Coils's expert on carriage of steel cargo by sea, explained that the notations regarding rust on the bills of lading were "non-restrictive clause[s] indicating that the goods [were] undamaged but affected by a form of atmospheric rust normal on all mild steel surfaces which are untreated against oxidation." This atmospheric rust, which he also termed "fresh water rust," is caused by the storage of hot rolled coils in open air prior to loading onto the vessel. Sparks stated that this type of rust does not result in harmful deterioration of the material, and only if the hot rolled coils come into contact with "an electrolyte more aggressive than fresh water[,] e.g. saltwater," does permanent damage to the plating occur. Moreover, he explained that "[i]t is not unusual for the goods to be shipped in an apparent rusty condition and wet," and despite the notations on the bills of lading, all of the bills of lading were signed clean, and therefore "all cargo when shipped was in apparent good order and condition."

Despite this evidence, the vessel interests argue that the rust found on the hot rolled coils prior to loading was probably caused by exposure to saltwater, because the coils were stored outdoors for an indefinite amount of time

in a "marine environment." They maintain that saltwater could have been carried by the wind from the sea to the place at which the coils were stored. However, as the district court noted, the hot rolled coils loaded at Ventspils, which were also noted as being rust stained on their bills of lading and, in accordance with custom, had likely also been transported and stored outdoors, tested negative for exposure to saltwater when subjected to silver nitrate tests prior to loading. The vessel interests argue that these silver nitrate tests are irrelevant because they were conducted at Ventspils, not Riga. Nevertheless, that the hot rolled coils at Ventspils had the same notations on their bills of lading and tested negative for saltwater exposure prior to loading clearly bears on the plausibility of the defendants' theory that the pre-loading rust on the Riga hot rolled coils was seawater rust caused by the marine environment.

In *Thyssen, Inc. v. S/S Eurounity*,[14] the Second Circuit confronted similar facts. The shipper sued the carriers for rust damage to hot rolled steel coils. However, the bills of lading contained notations such as "rust stained," "partly rust stained," and "wet before shipment."[15] The defendants urged that these notations prohibited a finding that the coils were in good condition upon loading. The Second Circuit disagreed, finding "ample evidence that the steel was in good condition."[16] For instance, experts the district court found credible testified that the clauses on the bills of lading indicated steel of good condition. One expert

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[14] 21 F.3d 533 (2d Cir. 1994).

[15] *Id.* at 536.

[16] *Id.* at 538.

testified that "[t]he Port . . . had used these standardized notations for approximately thirty years to refer to non-damaging, atmospheric rust that does not affect the value of steel. [The expert further] testified that steel is considered to be in 'prime' condition when the bills of lading include these standardized notations."[17] On the basis of this evidence, the Second Circuit affirmed the district court's determination that the shipper had made out a prima facie case.[18]

We conclude that the district court in this case did not clearly err in finding that the hot rolled coils were in good condition prior to loading. That the rust noted on the coils was atmospheric and nondamaging in nature, and that the moisture on the coils also did not affect their good condition is supported by the evidence.

As for the cold rolled and galvanized coils, the vessel interests argue that the bill of lading notation that the condition of these coils was unknown fatally undermined Steel Coils's attempt to prove a prima facie case of good condition. For this argument they rely on *Caemint Food,*

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[17] *Id.*

[18] *Id.* Similarly, in *Couthino, Caro & Co. v. M/V Sava,* 849 F.2d 166 (5th Cir. 1988), cold rolled and galvanized steel coils were damaged, allegedly by seawater. Although we did not take up the question of whether the plaintiff had presented a prima facie case that the coils were in good condition upon loading, we did summarize the district court's findings on this issue. *Id.* at 168. We explained that although the bills of lading contained numerous exceptions noting rust and packaging damage, the district court nonetheless found the coils to have been in good condition prior to shipment, because the shipper's expert opined that the coils were loaded in mill condition and the bills of lading described only "light atmospheric rust," not "a problem affecting the coils." *Id.*

Inc. v. Lloyd Brasileiro Companhia de Navegacao, in which the Second Circuit reasoned:

> Although a clean bill of lading normally constitutes prima facie evidence that cargo was in good condition at the time of shipment . . . it does not have this probative force where . . . the shipper seeks to recover for damage to goods shipped in packages that would have prevented the carrier from observing the damaged condition had it existed when the goods were loaded.[19]

Caemint held that a plaintiff could not recover for corned beef it claimed was ruined during the voyage because it could not present evidence as to the condition of the corned beef, which was inside metal containers, before shipment.[20]

We have similarly stated that "[w]here because of the perishable or intrinsic nature of the commodity, the internal condition is not adequately revealed by external appearances, cargo may have a considerable burden of going further to prove actual condition."[21] That is not the case here. Captain Sparks testified that although the wrappers of the cold rolled and galvanized coils loaded at Riga were wet due to condensation, there was no evidence of "drip-down" or "run-down" of moisture to the coils and no mention in the bills of lading of "white rust or white oxidation marks," which are normal preshipment clauses indicating possible rust damage to the coils. He concluded

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[19] 647 F.2d 347, 352 (2d Cir. 1981).

[20] *Id.* at 355.

[21] *United States v. Lykes Bros. S.S. Co.,* 511 F.2d 218, 223 (5th Cir. 1975) (internal quotation marks omitted).

that "[t]he amount of moisture on those coils must have been negligible" and "[t]here was no damage to those coils."

The evidence at trial showed that, had the cold rolled or galvanized coils been damaged by rust, their outer wrappers would have revealed it. Because the wrappers had no indication of rust, and the moisture on the outside of the wrappers was not dripping down into the coils, it was not clearly erroneous for the district court to conclude that the cold rolled and galvanized coils were in an undamaged state prior to loading.

The vessel interests further assert clear error in the finding that the steel coils were damaged upon unloading. The contention is that seawater could not have entered through the hatches because the top-stowed cargo unloaded at Camden had no seawater damage, and that perhaps the steel coils rusted on the way from the ship to their ultimate inland destinations.

The vessel interests' arguments are belied by a wealth of evidence relied upon by the district court that at unloading the cargo was damaged by seawater rust. For instance, the McLarens Toplis survey conducted in New Orleans noted "rust stains to coils to varying extents," and "[r]andom tests on the rust stained areas with a solution of silver nitrate proved positive" with respect to chlorides, "indicating water ingress." The McLarens Toplis survey in Houston similarly stated that "[t]he cargo was examined and found to be extremely rusty," and that "[e]xtensive silver nitrate tests were conducted with strong positive results. It is our opinion [that] the . . . cargo came into contact with sea water, most likely through the poorly maintained hatch covers. . . . "

The vessel interests have not cited any evidence in the record that disputes these conclusions. Their argument that the district court "simply accepted plaintiff's survey reports and testimony *en masse* as setting forth the proper measure of damages, and that the damage was proven at discharge" implicitly acknowledges that substantial evidence in the record supports the district court's conclusions as to the damage evident at unloading.

B.

Facing a prima facie case, a defendant may escape liability if it shows that it exercised "due diligence . . . to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds . . . and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation."[22] The vessel interests urge that even if Steel Coils carried its initial burden, they exercised due diligence in making the vessel seaworthy and thus should have escaped liability.

In making its determination that the defendants did not exercise due diligence, the district court correctly noted that seaworthiness is defined as "reasonable fitness to perform or do the work at hand,"[23] and explained that, under COGSA, the carrier's duty to exercise due diligence

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[22] 46 U.S.C. § 1304.

[23] *See Farrell Lines, Inc. v. Jones*, 530 F.2d 7, 10 n.2 (5th Cir. 1976) (internal quotation marks omitted).

in making the vessel seaworthy is nondelegable.[24] It concluded that the ship was not reasonably fit to perform the work at hand – shipping steel coils – because the hatches were not maintained in good condition and had not been tested for watertightness before embarkation, which had resulted in an ingress of seawater during the voyage, and because the holds, which had previously carried a cargo of rock salt, had not been washed out with fresh water before the steel was loaded.

The vessel interests dispute these findings, arguing that the surveys done prior to embarkation show that the hatches were in watertight condition. They further deny any obligation to test the watertightness of the hatch covers prior to the voyage, because by the voyage charter that obligation belonged to Itochu. Finally, they deny any contractual obligation to wash the holds with fresh water instead of Baltic Sea water.

Although preload surveys conducted at Riga found the hatches sufficient, one of the surveys also noted deficiencies in the hatch covers. The SKS International Cargo Service survey found that "[t]he hatch-cover tightening rubbers are deformed (pressed inside) more or less everywhere. Also[,] the ends of these rubbers are pressed out or glued out on the extremes of hatch-covers." The report further detailed that "[t]he condition of hatch trackways and coamings [was] found as satisfactory but rusty and

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[24] *See Jamaica Nutrition Holdings, Ltd. v. United Shipping Co.*, 643 F.2d 376, 379 (5th Cir. 1981) ("COGSA . . . imposed a nondelegable duty on [the carrier] to exercise due diligence to make the vessel fit for carriage of the cargo shipment.").

with the traces of corrosion. The compression bar is partly bent (deformed) . . . due to wear and tear."

Captain Sparks explained that the description of the hatches found in the SKS survey "indicates that the required maintenance was not performed." Moreover, he opined that the preload surveyors' conclusion that despite these deficiencies the hatches were watertight is not reliable because the "watertight integrity of the hatches was not determined [by a hose test or ultrasound test], as is customary with steel cargoes in the industry prior to commencement of the sea voyage."

That the hatches were insufficiently maintained is further supported by the observations of the Seaspan Marine Consultants surveyor who inspected the hatches after the vessel docked in Camden. He noted that the rubber gaskets of the hatch panels had deep grooves in them, were worn out in several places, were heavily rusted and bent or waved in certain areas, and that parts of the gaskets were missing or cut in some places.

In line with these observations, the McLarens Toplis surveyor in Houston reported after inspection of the vessel:

> The vessel appeared to be very poorly maintained. Our inspection of the hatch covers noted them to be in extremely poor condition. We noted large amounts of rust flaking off at the slightest of touches. We noted the compression bars, channel bars, and general areas around the hatch coaming to be severely dented, gouged, and holed to varying degrees. We noted the hatch packings to be gouged, missing, and the general area around the hatch packings to be wasted severely.

> We also noted the channel areas to be bent. Severe drip downs were noted in all hatches.
>
> It is our opinion [that] the cargo hatches were poorly maintained and appeared to have severe sea water ingress in all cargo hatches that were of concern at this port.

Captain Sparks concluded from these descriptions that "when the vessel commenced the voyage from the Baltic Sea to Camden the hatches were defective owing to lack of maintenance," and as a result they "were not weather tight." Although the vessel interests take issue with the competency of this evidence and argue that the preload survey reports should have been given more weight than Captain Sparks' "hindsight" opinions, there was sufficient evidence to support the district court's conclusion that the hatches were inadequately maintained and it was not clearly erroneous.

The vessel interests also argue that they were not responsible for conducting a watertightness test on the hatch covers prior to embarkation, because pursuant to the voyage charter Itochu was supposed to "make an inspection of holds and test watertightness of hatches." This argument ignores the COGSA carrier's nondelegable duty to ensure that the vessel is reasonably fit to carry steel cargo.

In *Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., Ltd.*, we rejected a similar argument.[25] There the trial court had found the defendant carrier liable for

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[25] 643 F.2d 376 (5th Cir. 1981).

failing to adequately clean out the pipes of the vessel before loading its cargo of soybean oil.[26] The ship's previous cargo had been molasses. Prior to loading the oil, a surveyor had visually inspected the ship's pipes and tanks and determined that they were suitable for carrying the oil.[27] After the ship reached its destination, another surveyor examined the oil and found it contaminated with molasses.[28] Based on this evidence, the district court concluded that the defendant's failure to clean adequately the vessel's tanks, pipes, and pumps rendered the vessel unseaworthy.[29]

On appeal, the defendant argued it should escape liability because the voyage charter party provided: "Vessel to clean tanks, lines and pumps *to Charterer's surveyor's satisfaction*."[30] It contended that because the charterer's surveyor had inspected the vessel's tanks and found them suitable, the carrier's obligation to the shipper was fulfilled.[31] However, we concluded otherwise, reasoning:

> COGSA, whether applicable by its own force or by virtue of the clause paramount, imposed a nondelegable duty on [the carrier] to exercise due

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[26] *Id.* at 377-78.

[27] *Id.* at 378.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 379 (emphasis added).

[31] *Id.; see also id.* at 379 n.4 ("COGSA allows a freedom of contracting out of its terms, but only in the direction of increasing the shipowner's liabilities, and never in the direction of diminishing them." (internal quotation marks omitted)).

> diligence to make the vessel fit for carriage of the cargo shipment. This duty was not abrogated by its covenant also to clean the vessel to the charterer's satisfaction. By permitting molasses residue to remain in the system, [the carrier] violated its duty.[32]

Because the duty to exercise due diligence to ensure the seaworthiness of a vessel is nondelegable, the district court here did not reversibly err in concluding that the vessel interests failed to exercise due diligence in part because they did not test the watertightness of the hatches.

Finally, the vessel interests maintain that they had no contractual duty to rinse out the holds with fresh water. Again we remind that the vessel interests need not be contractually bound to perform a task for its omission to be a lack of due diligence. They do not dispute that before transporting the steel coils the vessel had transported coal, and before that, rock salt. They also do not deny that before loading the coils onto the ship the holds were washed out with Baltic Sea water, which has a higher salt content than fresh water. When asked whether the holds should have been washed out with fresh water before loading the steel cargo, Captain Sparks explained, "as chlorides are, even in a reduced form, so devastating to steel surfaces, . . . we always advocate that after washing out the holds, the final wash-down should be done with fresh water."

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[32] *Id.* (internal citations and footnote omitted).

The district court's finding is supported not only by Captain Sparks's opinions but also by silver nitrate tests conducted both at Riga and Ventspils after the holds were washed out that revealed the presence of chlorides in the holds. Even after these tests proved positive for salt, the crew did not wash the holds out with fresh water. The results of the silver nitrate tests show not only that the crew should have washed the holds out with fresh water to begin with but also that the crew did not take the necessary precautions to protect the cargo even after they knew salt was in the holds. We therefore can find no error in the district court's determination that the crew's failure to wash out the holds with fresh water was a lack of due diligence.

C.

The vessel interests contend that even if the district court's finding on due diligence can be sustained, the coils became damaged due to causes for which COGSA liability is excepted.

1.

Under section 1304(2) of COGSA, "[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . [p]erils, dangers, and accidents of the sea or other navigable waters."[33] At trial the defendants argued that a storm encountered by the M/V Lake Marion on its transatlantic voyage constituted a

[33] 46 U.S.C. § 1304(2)(c).

"peril of the sea" and caused the saltwater to enter the holds. The ship's captain testified that he encountered very rough weather during the journey, with strong winds that occasionally reached Beaufort Scale Force 10 and, at their peak, reached force 11 to 12 for approximately two hours on March 26.

The trial judge rejected the peril of the sea defense for two reasons. First, such weather conditions were foreseeable in the North Atlantic during the late winter months. Second, no damage to the vessel resulted from the voyage, and the only conditions noted in the surveys at the discharge ports indicated preexisting damage as a result of prolonged neglect.

The vessel interests contend that it is irrelevant that the conditions encountered by the M/V Lake Marion were foreseeable, because with their force 12 winds they were severe enough as to have been unpreventable even if foreseeable, like hurricane weather. They claim these conditions resulted in significantly more movement of the hatch covers than is normal.

The vessel interests rely upon *J. Gerber & Co. v. S.S. Sabine Howaldt,* a case from the Second Circuit which concluded that similarly rough conditions were a peril of the sea.[34] The shipper had chartered the vessel to carry steel products across the Atlantic.[35] Upon unloading, the steel showed extensive signs of rust damage from exposure to seawater.[36] The defendants claimed the peril of the sea

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[34] 437 F.2d 580, 588 (2d Cir. 1971).

[35] *Id.* at 583.

[36] *Id.*

defense.[37] The district court found the weather conditions through which the ship sailed were not a peril of the sea, and awarded damages to the shipper.[38] The Second Circuit reversed, finding that the conditions were sufficiently perilous.[39] The vessel in *J. Gerber* faced days of force 9 and 10 winds, and over ten hours in which the winds reached force 11 and 12.[40] It had to heave to and remain in that state for twelve hours. These fierce winds twisted the ship's hull and caused her to roll violently and shudder and vibrate "as she was pounded and wrenched by the heavy seas."[41] After the storm abated, the crew found damage to the ship in several areas: a piece of equipment was torn off the deck, leaving a hole; a porthole in the galley was smashed; a gangway was destroyed; two winch covers were ripped off; and the vessel had several dents.[42]

In determining whether the storm constituted a peril of the sea, the court found of great importance "the wind velocity in terms of the Beaufort Scale."[43] Although it explained that "[n]o exact Beaufort Scale wind force can be referred to as the dividing line which will determine those cases in which a peril of the sea is present and those, below that mark, in which it is not," it found "few cases in which the winds are force 9 or below . . . in which there

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[37] *Id.*

[38] *Id.* at 583-84.

[39] *Id.* at 584.

[40] *Id.* at 584-86.

[41] *Id.* at 586.

[42] *Id.*

[43] *Id.* at 596.

has been found to have been a peril of the sea, whereas there are many where the force has been 11 or above."[44]

It also cautioned that wind velocity is "a rough measure at best and not sufficient standing by itself."[45] There are other indicia.[46] Assuming a seaworthy ship, they include the "nature and extent of the damage to the ship itself, [or] whether or not the ship was buffeted by cross-seas which wrenched and wracked the hull and set up unusual stresses in it."[47] Looking to these other considerations, the court concluded that the damage to the cargo was caused by a violent peril of the sea that, "through wrenching and twisting the vessel, set up torsions within the hull which forced up the hatch covers and admitted sea water to the holds."[48] The vessel interests argue that we should reach the same conclusion as the *J. Gerber* court, because the wind force encountered by the ship in that case was in line with that faced by the Lake Marion. Although the conditions experienced by both vessels contain some parallels, they were not identical. In *J. Gerber* the ship faced force 11 to 12 winds for approximately ten hours;[49] the Lake Marion only encountered

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 597.

[49] *Id.* at 584-85 ("By 0200 on December 23rd [the wind force] went up to force 11 with gusts at force 12 in 'hurricane-like rain squalls.' By 0500, due to the criss-cross running swells and high breaking seas, the ship was badly strained in her seams and sea water was breaking over forecastle deck, hatches and upper works. It was necessary for the vessel to heave to and she so remained for 12 hours. At 0900 the force

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such winds for two hours. Captain Sparks testified that because the ship's exposure to those winds was short, the wave height likely did not build up to that normally encountered with force 11 to 12 winds. He explained, "[s]ea condition builds up slowly as the wind increases" and therefore "the wind force is way ahead of it." As a result "it'll take three to four hours to build up to what it should be." Although with force 12 winds the accompanying sea height is typically fourteen meters, Sparks opined that the highest it reached with the Lake Marion was eleven and a half to twelve meters before the wind force started to reduce.

The vessel interests also overlook the fact that the strength of the wind is but one among several factors that should be considered in determining the applicability of the peril of the sea defense. As emphasized by *J. Gerber,* the extent of damage to the vessel is also important. The vessel in that case sustained a great deal of damage, while the captain of the Lake Marion reported none. Captain Sparks confirmed that the ship was not damaged by the weather, as the only problems noted in the discharge surveys referred to preexisting damage as a result of prolonged neglect.

We, like the district court here, find telling that the ship sustained no reported damage as a result of the stormy conditions. As one court has noted,

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11 wind with gusts in squalls of force 12 steadied at a constant hurricane force of 11/12 or about 63 knots, which continued to a time between 1200 and 1300.").

> [t]he absence of damage to the vessel itself is always an important consideration. Indeed, the courts have often required that the structural damage be substantial. . . . [I]f there was no structural damage or if the damage was limited to one fitting, such as a hatchway or a ventilator cowl, which led to damage to the cargo, courts will find with reluctance that the damage resulted from a peril of the sea.[50]

We sustain the district court's refusal to find the rough weather encountered by the M/V Lake Marion to have been a peril of the sea given the ship's lack of injury. We cannot conclude on this record that the noted storm, even with its force 12 winds, constituted a peril "of an extraordinary nature or aris[ing] from irresistible force or overwhelming power" which could not "be guarded against by the ordinary exertions of human skill and prudence."[51]

2.

The vessel interests also urge another exception to COGSA liability. COGSA exempts any damage caused by "[l]atent defects not discoverable by due diligence."[52] Defendants argued at trial that a crack found in Hold No. 1 while the vessel was docked in New Orleans, which ruined 123 coils in that hold, was a latent defect that could not have been discovered through due diligence. The trial

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[50] *Kane Int'l Corp. v. MV HELLENIC WAVE,* 468 F.Supp. 1282, 1286 (S.D. N.Y. 1979) (internal quotation marks and citations omitted).

[51] *J. Gerber & Co.,* 437 F.2d at 588 (internal quotation marks omitted).

[52] 46 U.S.C. § 1304(2)(p).

judge rejected the contention that the fracture was a latent defect.

"A true latent defect is a flaw in the metal and is not caused by the use of the metallic object" or by "gradual deterioration."[53] Such a defect "is one that could not be discovered by any known and customary test."[54] The ship owner has the burden to demonstrate that the defect was not discoverable.[55]

The vessel interests posit that since a latent defect is one not discoverable in the ordinary course of surveys or inspections, and the M/V Lake Marion's holds were inspected during the loading process, the crack was by definition a latent defect. However, Marine surveyor Captain Rasaretnam inspected the crack and determined that it was old, and had existed in some form since crews installed a doubling plate at the fracture site. The district court concluded that the crack was an extension of an old crack, and at least part of it had been present since the doubling plate had been put in place. Moreover, Captain Sparks hypothesized that the crack was caused by gradual deterioration, not by a defect in the metal. We cannot conclude that the district court clearly erred in finding that the fracture was old and in rejecting the latent defect defense.

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[53] *Waterman S.S. v. U.S. Smelting, Ref. & Mining Co.*, 155 F.2d 687, 691 (5th Cir. 1946).

[54] *Id.*

[55] *Id.*

V.

In addition to its COGSA claims, Steel Coils asserted a general maritime negligence claim against Lake Marion, Inc.'s managing agent, Bay Ocean. The claim is that Bay Ocean, as vessel manager, hired the crew and was responsible for maintaining the vessel's condition, and that it was negligent in maintaining and testing the hatch covers, failing to repair the crack in Hold No. 1, and in washing the holds with seawater. Bay Ocean contended at trial that Steel Coils could not assert a negligence claim against it outside of COGSA.

The district court disagreed, holding Bay Ocean liable in tort for its negligence separate from the COGSA claim, and finding Bay Ocean liable for the entire amount requested by Steel Coils because Bay Ocean was not entitled to claim the $500-per-package limitation on liability found in COGSA. These are conclusions of law and we conduct a *de novo* review.

"One of COGSA's most important provisions limits a [vessel or] carrier's liability to five hundred dollars . . . per package unless a higher value is declared by the shipper."[56] The term "carrier" includes "the owner or the

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[56] *Mannesman Demag Corp. v. M/V CONCERT EXPRESS*, 225 F.3d 587, 589 (5th Cir. 2000); *see* 46 U.S.C. § 1304(5) ("Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the

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charterer who enters into a contract of carriage with a shipper."[57] We have held that as long as an entity is a party to the contract of carriage, it is a carrier. In *Sabah Shipyard Sdn. Bhd. v. M/V Harbel Tapper*,[58] we stated, "[t]o determine whether a party is a COGSA carrier, we have followed COGSA's plain language, focusing on whether the party entered into a contract of carriage with a shipper. . . . [A] party is considered a carrier under COGSA if that party 'executed a contract of carriage.'"[59]

It is undisputed that Bay Ocean is not explicitly named in the applicable contract of carriage, the voyage charter between Western Bulk and Itochu.[60] Nevertheless, Bay Ocean maintains that it was a party to the time charter between Lake Marion, Inc. and Western Bulk, and therefore Western Bulk acted as Bay Ocean's agent, as well as Lake Marion's, in entering into the voyage charter

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bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.").

[57] § 1301(a).

[58] 178 F.3d 400 (5th Cir. 1999).

[59] *Id.* at 405 (internal quotation marks omitted).

[60] The district court concluded that the voyage charter party, rather than the bill of lading, was the applicable contract of carriage because if a bill of lading is held by the same shipper that executed the voyage charter party, the charter party governs the transaction. *See In re Marine Sulphur Queen*, 460 F.2d 89, 103 (2d Cir. 1972). The trial court found that Itochu, in entering into the voyage charter, acted as Steel Coils's agent. Since Steel Coils was the shipper that held the bills of lading and was a party to the voyage charter by virtue of its agency relationship with Itochu, the voyage charter party was the contract of carriage. Steel Coils did not argue in its original brief that Itochu was not its agent, and thus waived the argument. *See Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 179 (5th Cir. 2000).

with Itochu. The district court rightly concluded that Bay Ocean was not a carrier.

The time charter states that it is between "Lake Marion, Inc. – Managers: Bay Ocean Management, Inc." and Western Bulk. However, the charter party only recites the duties and rights of the time charterer, Western Bulk, and the owner, Lake Marion, Inc. It does not bind Bay Ocean in any way. Bay Ocean's presence in the contract is simply as a signing agent of the owner, as evidenced by the signature line, which provides that Bay Ocean signed the time charter for Lake Marion Inc. "As Agents Only." Because the time charter party was solely between Western Bulk and Lake Marion, Western Bulk did not enter into the voyage charter party with Itochu on Bay Ocean's behalf, but rather only on Lake Marion's, and Bay Ocean's only status in this case is as an agent of the carrier, Lake Marion, Inc.

In *Robert C. Herd & Co. v. Krawill Machinery Corp.*,[61] the Supreme Court clarified that agents of a carrier do not qualify for the $500-per-package limitation. The precise question presented was whether the limitation "also appl[ied] to and likewise limit[ed] the liability of a negligent stevedore."[62] The stevedore's employees had, while loading the plaintiff's cargo onto the vessel, dropped one of the cases, which contained a press weighing nineteen tons, into the harbor. After the plaintiff filed suit against the stevedore, the stevedore asserted that its liability was

[61] 359 U.S. 297 (1959).

[62] *Id.* at 298.

limited to $500 by COGSA.[63] In determining whether the package limitation applied, the Supreme Court first looked to the language and legislative history of COGSA to determine whether Congress intended to limit the liability of "negligent agents of a carrier."[64] It observed:

> The Act is clearly phrased. It defines the term "carrier" to include "the owner or the charterer who enters into a contract of carriage with the shipper." It imposes particularized duties and obligations upon, and grants stated immunities to, the "carrier." Respecting limitation of the amount of liability for loss of or damage to goods, it says that "neither the carrier nor the ship" shall be liable for more than $500 per package. It makes no reference whatever to stevedores or agents.[65]

Moreover, "[t]he legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921," which "do not advert to stevedores or agents of a carrier," and "[t]he debates and Committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act likewise do not mention stevedores or agents."[66] The Court concluded that nothing in the language or the legislative history of the Act either "expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence."[67] Despite this language in *Herd,* Bay Ocean

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[63] *Id.* at 298-99.

[64] *Id.* at 301.

[65] *Id.* (citations omitted).

[66] *Id.*

[67] *Id.* at 301-02.

argues that even if it is nothing more than an agent of the carrier it may avoid liability altogether on Steel Coils's separate negligence claim because COGSA is the exclusive remedy for suits for damage to cargo. However, in a similar case, *Citrus Marketing Board of Israel v. J. Lauritzen A/S*,[68] the Second Circuit held that a plaintiff may sue a ship's manager in tort for damage to cargo and that COGSA does not govern such an action. The *Citrus Marketing* court rejected the manager's argument and the district court's holding that COGSA controlled the claim, explaining that COGSA only applied to disputes between shippers and carriers.[69] Relying on *Herd,* the court concluded that COGSA did not preclude a separate action against the manager.[70] It explained, however, that a Himalaya Clause,[71] which extends a carrier's rights under

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[68] 943 F.2d 220 (2d Cir. 1991).

[69] *Id.* at 222.

[70] *Id.* at 222-23.

[71] The Himalaya Clause included in the bill of lading in *Citrus Marketing* provided:

> *Benefit to Third Parties.* Every agent or employee of the Carrier or Shipowner and every independent contractor who performs any part of the services provided by the Carrier or Shipowner, including the vessel's officers and crew, stevedores, shore side employees, draymen, crane and other machinery operators, shall have the same rights, privileges, limitations of liability[,] immunities and powers provided for the Carrier by this contract, by [COGSA], or by any other statute or regulation, the foregoing contract provisions being made by the Carrier and Shipowner for the benefit of all other persons and parties performing services in respect of loading, handling, stowing, carrying, keeping, caring for, discharging, and delivering the Goods or otherwise.

Id. at 221.

COGSA to agents of the carrier, might apply to save the manager from liability and remanded that issue for the district court to consider at trial.[72] In finding that COGSA did not prohibit Steel Coils's negligence claim against Bay Ocean, the trial judge relied upon *Citrus Marketing*.[73]

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[72] *Id.* at 223-24; *see also Cerro Sales Corp. v. Atl. Marine Ent.*, 403 F.Supp. 562, 568 (S.D. N.Y. 1975) (holding that a vessel's manager was "not covered by the limitations of COGSA available to a carrier, and . . . may be fully liable for its acts of negligence").

[73] The trial judge also relied upon *Associated Metals and Minerals Corp. v. Alexander's Unity MV*, 41 F.3d 1007 (5th Cir. 1995). In that case, we explained that while "COGSA governs certain aspects of claims for damages to cargo and provides carriers with certain defenses," it does not "preclude claims in tort for negligent damage to cargo." *Id.* at 1017. The district court here interpreted *Alexander's Unity* as holding that COGSA does not prohibit separate negligence claims. However, whether a noncarrier may be sued in tort outside of COGSA was not broached by the *Alexander's Unity* court, which instead dealt with the question whether a shipper's cause of action under COGSA against the vessel *in rem* for damage to steel cargo was properly categorized as sounding in tort or contract. *Id.* at 1014-17. If the claim was "for damage arising out of maritime tort," it was entitled to preferred maritime lien status. *Id.* at 1011-12. The defendant argued that COGSA provided the plaintiff's exclusive remedy for damage to cargo, and that, under COGSA, a plaintiff's claims sound only in contract. *Id.* at 1013. We rejected the defendants' argument, explaining that although COGSA certainly applied to the claim at issue, which was between a shipper *and* a vessel, "the Act does not abrogate the long-standing rule of admiralty allowing certain cargo claims to sound both in tort and in contract." *Id.* at 1016. Therefore, the court discussed only the proper categorization of the plaintiff's COGSA claim, not whether tort claims against noncarriers for damage to cargo could fall outside of COGSA.

However, *Alexander's Unity* also does not hold, as Bay Ocean contends, that a shipper can never set forth a tort claim for damage to cargo against a noncarrier outside of COGSA. Although it quotes a statement from *St. Paul Fire & Marine Insurance Co. v. Marine Transportation Services Sea-Barge Group, Inc.*, 727 F. Supp. 1438, 1439 (S.D. Fla. 1989), that COGSA provides an "exclusive remedy, barring all

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Bay Ocean charges that the district court's ruling that Bay Ocean cannot take advantage of the $500-per-package limitation "ignores the reality of maritime commerce," because it is common for one-vessel corporations such as Lake Marion, Inc., who have no employees, to act solely through their managing agents. It also argues that this result will "allow shippers to circumvent not only the package limitation, but all of COGSA, when contracting with a vessel with a separate managing agent." However, Bay Ocean chose to separate itself from Lake Marion by binding only Lake Marion to the time charter. In doing so Bay Ocean chose that only Lake Marion would become a carrier for purposes of COGSA.[74] We agree with the Second Circuit that a noncarrier can be held liable in tort outside of COGSA.[75] Steel Coils's negligence action against Bay Ocean was not subject to the COGSA package limitation.

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other theories of liability, including theories of negligence," it quotes it in the context of discussing a claim for cargo damage against a vessel, not against a noncarrier. *Alexander's Unity,* 41 F.3d at 1017. Moreover, a plain reading of *St. Paul* makes clear that it was only explaining that, when COGSA applies, which is in the context of a shipper's suit against a carrier or vessel for cargo damage, it provides the exclusive remedy. *See St. Paul,* 727 F. Supp. at 1442. It did not reason that a shipper cannot sue a noncarrier outside of COGSA.

[74] Bay Ocean also ignores the availability of a Himalaya Clause.

[75] *Neutax, S.A. v. Global Freight Services, Inc.,* 2002 A.M.C. 2576 (S.D. Fla. 2002), does not change our conclusion. Although Bay Ocean submitted this case after oral argument on the basis that it constituted further pertinent authority with regard to this issue, it does not address whether COGSA is the exclusive remedy for a shipper who wishes to sue a noncarrier for damage to cargo. *See id.*

VI.

For these reasons, we AFFIRM the district court's judgment.[76]

[76] We do not take up the issues presented in either Steel Coils's or Western Bulk's cross-appeals. Both Steel Coils and Western Bulk wished the court to address their cross-appeals only if we found the vessel interests' points of error meritorious.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEEL COILS, INC.	CIVIL ACTION
VERSUS	NO: 98-3116
M/V LAKE MARION, ET AL.	SECTION: "R" (1)

ORDER AND REASONS

(Filed Nov. 29, 2001)

I. Background

Steel Coils, Inc. seeks $550,000 in damages to a shipment of steel coils carried aboard the M/V LAKE MARION from ports in Latvia to ports in the United States. Steel Coils sued Lake Marion, Inc., the owners of the M/V LAKE MARION; Western Bulk K/S Oslo, the time charterer of the vessel; Bay Ocean Management, Inc., the manager of the vessel; and the M/V LAKE MARION, *in rem*. Lake Marion filed a cross-claim for indemnity, contribution, and recovery against Western Bulk, who then filed a cross-claim against Lake Marion and Bay Ocean. Western Bulk also filed a third-party complaint against Itochu International, Steel Coils' parent company and the voyage charterer of the vessel, seeking indemnity, contribution, and recovery.

The dispute culminated in a one day bench trial. After reviewing the evidence presented at trial and the applicable law, the Court finds that defendants are liable to plaintiff for the damage to its cargo. Lake Marion is liable to Western Bulk for indemnity and contribution under the Time Charter. All other cross-claims, counterclaims, and the third-party complaint are dismissed. This determination is based on the following findings of fact and conclusions of law..

II. Findings of Fact

A. The Parties

Plaintiff, Steel Coils, Inc., has its principal office and place of business in Deerfield, Illinois, and it is engaged in the business of distributing flat rolled steel products. James Pinkert, the president and former purchasing manager of Steel Coils, testified that Steel Coils received orders for the cargo in issue from various customers and then placed orders to import the steel from a mill in Russia. (*See* Pinkert Deposition at 9.) Its parent company, Itochu, financed the steel purchases. At Steel Coils' request, Itochu opened a letter of credit with the Russian mill or its representatives, purchased the steel for Steel Coils, and then invoiced Steel Coils for the steel plus a fee. (*See id.* at 9-10.) Itochu also chartered the LAKE MARION for Steel Coils to ship the cargo to the United States. (*See* Pinkert Deposition at 91, 119-20; Olivera Deposition, at 28.) Steel Coils paid the freight rate directly to Western Bulk, and it procured insurance on the cargo. (*See* Pinkert Deposition at 128; Olivera Deposition at 30-31.) The transaction in issue was typical of the way Itochu and Steel Coils had procured carriage for steel cargo for a number of years. (*See* Olivera Deposition at 29-30; Pinkert Deposition at 90.) The Court finds that Itochu was acting as Steel Coils' agent in these transactions.

The LAKE MARION was an ocean going cargo ship built in 1980, and it was engaged in the common carriage of cargo for hire. (*See* Joint Statement of Uncontested Material Facts 7a., Pre-Trial Order.) Lake Marion, Inc. owned and operated the LAKE MARION. (*See* Joint Statement of Uncontested Material Facts 7b., Pre-Trial Order.) Bay Ocean Management, Inc. served as the manager of the LAKE MARION. (*See* Joint Statement of

Uncontested Material Facts 7b., Pre-Trial Order; Exhibit 98.) As the LAKE MARION's captain testified, Bay Ocean employed the master and crew of the vessel and was responsible for ensuring that the vessel was properly maintained, manned and equipped for the voyage. Western Bulk Carriers served as the "middleman" in the operation. It time-chartered the LAKE MARION from its owners (Exhibit 98), and it entered into a voyage charter with Itochu for the LAKE MARION to carry the cargo in issue. (Exhibit 97).

B. The Charter Parties

Western Bulk voyage chartered the LAKE MARION to Itochu or its guaranteed nominee. (*See* Exhibit 97.) The parties used a standard GENCON form with a typewritten "rider." Under Clause 2, the owner warranted that the vessel would be seaworthy and equipped to carry the cargo. (*See* Ex. 97.) Clause 31 of the Rider incorporates a number of standard shipping terms into the charter party as if written *in extenso.* (*See id.*) In particular, Clause 31 incorporates the USA Paramount Clause:[1]

> Chamber of Shipping, Voywar 1950, New Jason Clause, P & I Bunkering Clause, New Both-to-Blame Collision Clause and USA Paramount Clause are to be fully incorporated in this Charter Party.

The USA Paramount Clause, not specifically set out in the Charter Party, provides that:

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[1] Also referred to as a "U.S.A. Clause Paramount." *See Brown & Root, Inc. v. M/V Peisander,* 648 F.2d 415, 420 (5th Cir. 1981).

> Bills of lading shall have the following clause: This bill of lading shall have effect subject to the provisions of the Carrier of Goods by Sea Act, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier.
> *Brown & Root, Inc.*, 648 F.2d at 420.

Additionally, Clause 32 provided that the agents at the load port would be the agents of the Owner, or Western Bulk. (*See* Ex. 97.) Tommas Lygrell, Western Bulk's operations manager for the voyage, and Juan Olivera, an Itochu representative, testified that the designated agent at the load port, Riga Shipping Agency, also acted as an agent for Itochu. (*See* Olivera Deposition at 40.) Riga issued the bills of lading and signed them "on Behalf of the Master." (*See* Bills of Lading, Exhibits 4,5,6,7,16,18, 20,22,24,33,41,50,52,61,70,79.) Despite the language of Clause 31 of the Voyage Charter, the bills of lading did not contain the USA Clause Paramount. (*See id.*)

Under Western Bulk's Time Charter of the LAKE MARION, Bay Ocean acted as Lake Marion's agent. (*See* Exhibit 98.) The Time Charter was on a New York Produce Exchange form, and it attached a "rider" of 72 clauses. Of particular importance, Clause 36 provided for the incorporation of the USA Clause Paramount in the bills of lading in the same manner as described for the Voyage Charter:

> U.S.A. Clause Paramount, New Jason, New Both-to-Blame, Conwartime 1993 (as attached), Chamber of Shipping Nuclear Clause to apply and form part of this Charter Party.

Clause 42 provided that the owners authorized the charterers or their agents to sign the bills of lading in accordance with mate's receipts on behalf of the master. Clause 53 provided that liability for cargo claims would be allocated in accordance with the Inter Club New York Produce Exchange Agreement, which provides that claims for cargo damage due to unseaworthiness will be 100% for owner, and claims for cargo damage due to bad stowage or handling will be 100% for charterers. (*See* Exhibit 111.)

C. Preparation For and Loading of the Steel

Hot rolled coils, cold rolled coils, and galvanized coils were loaded into the vessel at the load ports in Riga and Ventspils, Latvia. (*See* Bills of Lading, Exhibits 4, 5, 6, 7, 16, 18, 20, 22, 24, 33, 41, 50, 52, 61, 70, 79.) When the hot rolled cargo was loaded from outdoor storage, it was wet from atmospheric moisture and covered with atmospheric rust. (*See id.*) Captain Musial, the LAKE MARION's captain, testified that the cold rolled and galvanized coils were loaded from enclosed warehouses. Atmospheric moisture was present on the steel wrappers around some of the cold rolled and galvanized coils loaded at Ventspils, and there were a few dents and tears in some of the cargo wrappers. (*See id.*) Silver nitrate tests performed on the cargo at loading were negative, indicating that the cargo had not been exposed to chlorides before it was loaded. (*See* Sia Elmers Report No. AD/97-110/UJL-F, Exhibit 99.) Captain Musial stated that the LAKE MARION's two previous cargoes were rock salt and steam coal. (*See also*

3D Marine USA, Inc. Report No. TMS/3027/JRM/97H, Exhibit 100.)

The pre-loading condition of the cargo was noted on the mate's receipts and transferred to the bills of lading. The bills of lading contained exceptions for the abovementioned conditions of the cargo. (*See* Bills of Lading, Exhibits 4,5,6,7,16,18,20, 22,24,33,41,50, 52,61,70,79.) None of the conditions described in the exceptions on the bills of lading is the subject of the claims involved in this action.

Western Bulk retained SKS International Cargo Service in Riga to inspect the holds of the vessel before the cargo was loaded. SKS issued a certificate that noted various deficiencies in the hatch covers and hatch cover closing appliances of the LAKE MARION. (*See* SKS International Cargo Service RIGA Holds Condition Certificate No. 10837/97-5, Exhibit 90.) The hatch covers should have been watertight when closed. Specifically, the inspector noted:

> "The hatch-cover tightening rubbers are deformed (pressed inside) more or less everywhere. Also, the ends of these rubbers are pressed out or glued out on the extremes of the hatch covers (Hold No. 3)."
> *Id.*

The "rubbers" referred to in the report provide the seal between the folding hatch cover sections and the hatch coamings. Captain Sparks, Steel Coils' expert on shipping steel by sea, testified that if the rubbers are deformed, compressed, out of place, and/or not well secured, the hatch cover cannot provide a weather tight seal. (*See* Sparks Deposition at 56-57.) Further, the SKS report observed:

> "The condition of hatch trackways and coamings found as satisfactory but rust and with the traces of corrosion. The compression bar is partly bent (deformed) somewhere due to wear and tear." Exhibit 90.

Rusty and corroded trackways and bent compression bars will prevent a watertight seal by compromising the hatch covers' ability to align properly with and close with sufficient pressure on the coaming. (*See* Sparks Deposition at 43,56-57,59,62.) Captain Musial testified that the LAKE MARION's crew usually conducted hose tests of the hatch covers to ensure that they were water tight before any cargo was loaded, but the crew did not conduct hose tests in this instance. Additionally, Western Bulk, as the time charterer, did not conduct an ultrasound test of the hatch covers to determine if they were fit for the voyage.

Before the cargo was loaded at the first load port, the crew washed the cargo holds with seawater from the Baltic Sea, but failed to rinse them with fresh water as is customary before loading steel cargoes. (*See* 3D Marine USA, Inc. Report No. TMS/3027/JRM/97H, Exhibit 100; Sparks Deposition at 51-54.) Captain Musial confirmed that salt residue was found in the cargo holds while the cargo was being loaded at Ventspils on March 4, 1997. (*See* Alpha Shipping Agency Statement of Facts, Exhibit 91.) Western Bulk was advised of the presence of chlorides in the holds, but took no steps to rinse the holds with freshwater before the cargo was loaded.

D. The Voyage and Discharge

The vessel departed from Ventspils on March 7, 1997 and arrived at its first stop, Camden, New Jersey, on

March 28, 1997. During the voyage, the vessel encountered rough weather. The vessel's logs reported that the worst weather that the vessel encountered was wind that reached Beaufort Scale Force of 11-12 for about one hour on March 26. (*See* M/V LAKE MARION Logs, March 26, 1997, Exhibit 92.) Captain Musial testified that he was aware that he might encounter Force 12 winds in the North Atlantic during the late winter. During the rest of the voyage, the vessel did not encounter winds exceeding Beaufort Scale 10, and most readings were below Beaufort Scale 9. (*See* Exhibit 92.) Although Captain Musial filed a Note of Protest at the first port of call, he did not claim any structural damage to the ship as a result of the weather that the vessel had encountered during the voyage.

At the first discharge port, Camden, the vessel discharged cold rolled coils from holds No. 1, 2, 4, and 7. Attending surveyors reported evidence of seawater entry into all of the these holds. (*See* Mclarens Toplis Survey Report No. 9736472/MSCD/LR, Exhibit 87.) Another report at Camden criticized the vessel's condition and noted specific deficiencies in each of the seven hatch covers and hatch cover closing fixtures. (*See* Seaspan Marine Consultants Report No. 4875/97, Exhibit 100.)

The vessel then traveled to New Orleans, where it discharged hot rolled coils, cold rolled coils, and galvanized coils from holds No. 1,2,3,4,6, and 7. Captain Rasaretnam, the cargo surveyor in attendance, reported that the vessel's hatch covers were in "apparent non-watertight condition, with signs of leakage and/or water ingress into all holds." (*See* McLarens Toplis Survey Report No. 97024014, Exhibit 88; Rasaretnam Deposition at 19-20.) The survey indicated positive silver nitrate reactions on

the cargo in the stow of holds 1,3,4,6, and 7, which confirmed that seawater had entered the holds. (*See* Exhibit 88; Rasaretnam Deposition at 30-44.) In New Orleans, the No. 1 hold of the vessel flooded up to 16 inches as a result of a crack in the plating that separated the No. 1 hold from the port wing ballast tank. (*See id.*) Rasaretnam observed the flooding and inspected the crack. He believed that the crack was an extension of an old crack over which a doubler plate had been welded. (*See id.*) As a result of the flooding, 123 cold rolled and galvanized coils sustained additional rust damage. (*See id.*) Bennett Woods, a surveyor retained by Steel Coils, testified that he surveyed the hot rolled coils in Chicago several months after they had been transported by river barge from New Orleans. Woods conducted silver nitrate tests and obtained negative results, but he sent a sample of the rusted steel to a laboratory to analyze the rust. (*See* Woods Deposition at 12-13, 16-18; McLarens Toplis Supplemental Report of Survey CHI 98/21926/8, Exhibit 32.) The laboratory analysis confirmed that the steel was contaminated by seawater. (*See* Wal-Henius Letter, Exhibit 49.) After Woods received the laboratory results, he concluded that the damage to the steel coils was the result of seawater contamination.

As a result of the damage to the cargo discharged in New Orleans, the Court finds that the value of the cargo was reduced as follows:

1. Under Steel Coils, Inc. ("SCI") claim reference CA 2489A, Steel Coils retained the 211 cold rolled coils at a depreciation of 30% from their sound market value of $409,301.46, for a loss of $122, 790.43. In addition, it incurred survey fees of $3,952.87 in connection with

that claim. (*See* Exhibits 1 through 12, inclusive.) Thus, the total for that claim is $126,743.30.

2. Under SCI claim reference CA 2489B, Steel Coils retained the 66 galvanized steel coils at a depreciation of 20% from their sound market value of $182,045.23, for a loss of $36,409.05. In addition, it incurred survey fees of $3,610.64 in connection with that claim. (*See* Exhibits 13 through 29, inclusive.) Thus, the total for that claim is $40,019.69.

3. Under SCI claim reference CA 2679, Steel Coils sold portions of the 79 hot rolled coils for salvage. The salvaged material had a sound market value of $12,697.59. The salvage value was $7,911.00, for a loss of $4,786.59. In addition, Steel coils incurred survey fees of $3,952.87 in connection with that claim. (*See* Exhibits 30 through 37, inclusive.) Thus, the total for that claim is $5,216.30.

4. Under SCI claim reference CA 3101A, Steel Coils sold portions of the 27 hot rolled coils for salvage. The salvaged material had a sound market value of $77,489.84. The salvage value was $55,355.08, for a loss of $22,134.76. In addition, it incurred survey fees of $345.50 in connection with that claim. (*See* Exhibits 38 through 45, inclusive.) Thus, the total for that claim is $5,216.30.

5. Under SCI claim reference CA 3031 and 3031B, Steel Coils sold portions of the 79 hot rolled coils for salvage. The salvaged material had a sound market value of

> $181,414.31. The salvage value was $132,814.54, for a loss of $48,599.77. In addition, it incurred survey fees of $366.50 in connection with those claims. (*See* Exhibits 46 through 57, inclusive.) Thus, the total for those claims is $48,966.27.

Surveyor Ben Woods opined that these amounts were fair and reasonable. (*See* Woods Deposition at 20-21, 27, 30, 32.) The Court finds that the total for all claims for cargo discharged in New Orleans is $243,426.09.

The last discharge port was Houston, where the vessel discharged hot rolled plates from holds No. 2,3, and 6. (*See* McLarens Toplis Marine Cargo Survey Report No. HOU/97304633, Exhibit 60.) The attending cargo surveyor, Keith Burges, had experience with the use and maintenance of the brand of hatch covers found on the LAKE MARION. He observed that the LAKE MARION was "very poorly maintained," and the hatch covers were "in extremely poor condition," which resulted in "severe sea water ingress." (*See id.;* Burges Deposition at 18-24.) Burges took rust scrapings from the damaged hot rolled plate at Houston and hand delivered them to Dixie Services for laboratory analysis. (*See* Burges Deposition at 26-27). Dixie Services performed a "seawater analysis" on the rust scrapings and concluded that the rust was the result of exposure to seawater and another substance of unknown origin. (*See* M. Renz Deposition at 10-14, 16-33; Exhibits 2,3,4 of Renz Deposition; Exhibit 60.)

The Court finds that it was necessary to clean and re-coat the plates as a result of the seawater rust damage to the cargo discharged at Houston. (*See* Duval Deposition at 40-41.) The cleaning and re-coating work was done by

Houston Tubulars, Inc. (*See id.*) The following claims were made for the cleaning and re-coating costs:

1. Claim CA 2489A for $134,833.61 plus survey fee of $7,026.54 for a total claim of $141,840.15. (*See* Exhibits 58 through 66, inclusive.)

2. Claim CA 2489B for $49,824.50 plus survey fee of $2,645.09 for a total claim of $52,469.59. (*See* Exhibits 67 through 75, inclusive.)

3. Claim CA 2489C for $64,250.58 plus survey fee of $3,372.53 for a total claim of $67,623.11. (*See* Exhibits 58 through 66, inclusive.)

The total of the cost of cleaning, re-coating, handling, and extra storage is $261,932.85. The Court finds that these costs are fair and reasonable, based on the testimony of the surveyor and as demonstrated by the survey reports submitted. (*See* Duval Deposition; Exhibits 60, 69, and 78.) In total, the Court finds that Steel Coils' sustained loses, inclusive of survey fees, of $505,358.94.

E. 5Q Survey

At Houston, the vessel's P & I Club commissioned a separate survey of the vessel's hatch covers, known as the 5Q Survey. (*See* 5Q Survey, Exhibit 93.) The survey photographs reveal the extremely deteriorated condition of the LAKE MARION's hatch covers and closing appliances. These include, but are not limited to, extreme rusting and wastage of the trackways, compression bars and closing appliances; torn, missing, and unsecured sections of rubber gaskets; missing drain valves; and defective cross

joint wedges and rusted coamings. (*See* photographs included in Exhibit 93.) The Court finds that the conditions described in the Camden and Houston surveys and depicted in the 5Q Survey photographs show clear evidence of seawater ingress due to unseaworthy conditions that could not have arisen during the course of a single voyage, but were the result of an extended period of neglect. (*See* Sparks Deposition at 99-106, 109-115, 121-123; Ex. 93.) The Court further finds that at the beginning of the voyage, the LAKE MARION's hatch covers could not have kept water out of the holds. (*See* Sparks Deposition at 123.)

III. Conclusions of Law

A. Rule 60 Motion – The Package Limitation

Under Rule 60(b)(2), a court may relieve a party from a final judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." FED. R. CIV. PROC. 60. In order to succeed on a motion brought under Rule 60(b)(2), "the movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment." *Government Financial Services One Limited Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 770-71 (5th Cir. 1995) (*quoting New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1200-01 (5th Cir. 1993)). "The newly discovered evidence must be in existence at the time of trial and not discovered until after trial." *Id.* (*quoting Longden v. Sunderman*, 979 F.2d 1095, 1102-03 (5th Cir. 1992)). Moreover, a district court may grant relief under Rule

60(b) only upon a "sufficient showing of unusual or unique circumstances," *Prior v. U.S. Postal Service,* 769 F.2d 281, 286 (5th Cir. 1985). The movant bears the burden of demonstrating the exceptional circumstances that warrant relief. *See Lavespere v. Niagara Mach. & Tool Works, Inc.,* 910 F.2d 167, 173-74 (5th Cir. 1990); *abrogated on other grounds, Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 n. 14 (5th Cir. 1994) (*en banc*).

Defendants move the Court to revisit its summary judgment rulings, which found the $500 per-package limitation inapplicable to the cargo damage. *See Steel Coils, Inc.,* 2000 WL 777916, *2 (E.D.La.2000); Order and Reasons, October 25, 2000 (restating previous ruling on same grounds). The Court finds that defendants have presented new evidence of the relationship between Steel Coils and Itochu as it relates to the transactions involved in this case, which compels the Court to reconsider its ruling. The Court finds that defendants exercised due diligence in obtaining the information because they could not discern the nature of the Steel Coils/Itochu relationship until they deposed a Steel Coils' representative. Defendants did not take this deposition until after the summary judgment motions were decided. (*See* Pinkert Deposition, December 14, 2000.) Further, the information obtained at the deposition regarding the Steel Coils/Itochu relationship is material because it relates to the essence of defendants' claim, namely, that Steel Coils should be bound by the package limitation because the voyage charter is the appropriate contract of carriage and because Steel Coils had a fair opportunity to avoid the package limitation and claim a higher value for the cargo.

Maritime law embraces the principles of agency. *Cactus Pipe & Supply Co., Inc. v. M/V MONTMARTRE,*

756 F.2d 1103, 1111 (5th Cir. 1985) (*citing West India Industries, Inc. v. Vance & Sons AMC-Jeep,* 671 F.2d 1384 (5th Cir. 1982)). Federal courts may rely "on the general common law of agency," and the Restatement (Second) of Agency is a "useful beginning point for a discussion of general agency principles." *Burlington Industries, Inc. v. Ellerth,* 524 U.S 742, 755-56, 118 S.Ct. 2257, 2265-66 (1998). An agency relationship may be express or de facto. *J.R. Stripling v. Jordan Production Company, LLC,* 243 F.3d 863, 870 (5th Cir. 2000). In order to demonstrate that a principal/agent relationship exists, it must be shown (1) that the principal indicated that the agent was acting for it, (2) that the agent acted or agreed to act on the principal's behalf, and (3) that the agent was subject to the principal's control. *See* Restatement (Second) of Agency § 1 cmt. a (1958). Further, a corporation may become an agent of another corporation: "Thus a subsidiary may become an agent for the corporation which controls it, or the *corporation may become the agent of the subsidiary."* Restatement (Second) of Agency § 14M cmt. a (1958) (emphasis added). The principal is affected by the knowledge that the agent has when it acts for him. *See* Restatement (Second) of Agency § 278. In other words, the knowledge of the agent is imputed to the principal. *See Metropolitan Wholesale Supply, Inc. v. M/V ROYAL RAINBOW,* 12 F.3d 58, 62 (5th Cir. 1994) (*citing Granger v. Deville,* 583 So.2d 583, 586 (La.Ct. App. 3d Cir. 1991)).

The Court finds that the evidence adduced at the deposition of James Pinkert, Steel Coils' president and former purchasing manager, and of Juan Olivera, an employee of Itochu's logistics department, establishes that Itochu was acting as Steel Coils' agent when it financed the purchase of steel from the mill and entered into the

Voyage Charter with Western Bulk for the shipment of the steel. After it received orders from its customers, Steel Coils placed orders with the Russian steel mill or its selling agents. (*See* Pinkert Deposition at 9.) The mill produced the steel and shipped it to the load port. (*See id.)* Itochu financed the steel purchases by opening a line of credit with the mill and purchased the steel for Steel Coils. Steel Coils repaid Itochu the purchase price plus a fee. (*See id.*) Steel Coils negotiated the price of the steel with the mill or its representative. (*See id.* at 112-114.) Therefore, the Court finds that Steel Coils was the principal in the purchase of the steel, and Itochu acted as its agent.

Then, in order to ship the steel to ports in the United States, Pinkert testified that Steel Coils asked Itochu to charter a vessel for it:

> Q: Did you ask Itochu to charter a vessel for you?
> A: Did we ask them? Steel would get to the port, Itochu, we need a ship.
> (*Id.* at 119.)

Olivera confirmed that the parent and subsidiary had an agency arrangement in which Steel Coils would instruct Itochu to charter a vessel to ship cargo Steel Coils had ordered whenever Steel Coils needed it to do so:

> Q: In this instance, when you charter for your subsidiary, how does that go and how does that work? How do you first get involved in the charter?
> A: Steel Coils would notify us of their intended cargo and we would charter the vessel with owners.
> (Olivera Deposition at 28.)

Although Itochu charged Steel Coils a fee for the chartering, the freight costs were charged directly to Steel Coils. Pinkert testified:

> Q: Does Itochu pay the freight or does Steel Coils pay the freight to, in this instance, Western Bulk?
> A: I'm pretty sure we pay the freight.
> Q: Directly?
> A: Yes.
> (Pinkert Deposition at 128.)

Again, Olivera confirmed Pinkert's description of the arrangement between Steel Coils and Itochu:

> Q: When you say that you were responsible for passing the freight bills for payment, in this instance of the LAKE MARION, to whom did you pass those freight bills to?
> A: To Steel Coils.
> Q: And who did Steel Coils pay?
> A: Western Bulk.
> Q: Directly?
> A: Yes.
> (Olivera Deposition at 31.)

In all, the evidence demonstrates that (1) Steel Coils asked Itochu to act for it, (2) that Itochu agreed to work on Steel Coils' behalf, and (3) that Itochu was subject to Steel Coils' control because it financed the steel purchases and chartered the vessel on Steel Coils' behalf whenever Steel Coils needed it to do so. Therefore, the Court finds that Itochu acted as an agent on behalf of its principal, Steel Coils, when it financed the steel purchase from the mill and entered the voyage charter with Western Bulk.

The discovery that Itochu acted as Steel Coils' agent when it entered into the Voyage Charter with Western

Bulk is an exceptional circumstance warranting relief from the Court's judgment that the package limitation does not apply. This follows because the bills of lading can no longer be considered the contract of carriage for determining the rights and responsibilities of the parties. When a bill of lading has been transferred for value to a third party not a party to the charter party, it constitutes an undertaking independent of the charter party except as to provisions of the charter party expressly incorporated into it. *See Cargill Incorporated v. Golden Chariot MV,* 31 F3d. 316, 318 (5th Cir. 1994) (*quoting Associated Metals and Materials Corporation v. M/V Venture,* 554 F.Supp. 281, 283 (E.D. La. 1983)). Essentially, when a bill of lading is negotiated to a third-party that was not a party to the charter agreement, the bill of lading constitutes the contract of carriage. *See id., Associated Metals,* 554 F.Supp. at 283. ("third parties, since they are strangers to the charter party, should be able to rely on clean bills of lading free from the restraint of agreements between the shipowner and charterer, as to which the third parties have no notice."), *see also* 2 Thomas J. Schoenbaum, Admiralty and Maritime Law, §11-6, at 210 (3d ed.2001).

Here, because Itochu entered the Voyage Charter as Steel Coils' agent, Itochu's knowledge of the terms of the contract can be imputed to Steel Coils, even though Steel Coils is not named in the Voyage Charter. *See Metropolitan Wholesale Supply, Inc.,* 12 F.3d at 62. Further, Pinkert testified that Steel Coils may have kept a copy of the Voyage Charter between Itochu and Western Bulk in its files. (*See* Pinkert Deposition at 92, 94.) Pinkert also testified that Steel Coils was involved in and controlled the steel transaction from its inception. This places Steel Coils in a far different position than a third-party

purchaser who is unrelated to the charterer. *See GOLDEN CHARIOT MV,* 31 F.3d at 316-318 (finding bill of lading was contract of carriage when third party merely entered contract to buy goods from the charterer). Therefore, because the Court finds that Steel Coils cannot claim to be a stranger to the voyage charter, the charter party, not the bills of lading, is the appropriate contract of carriage for the voyage. *See Cargill Ferrous International v. M/V ARCTIC CONFIDENCE,* 1994 WL 97787, (E.D. La. 1994) ("So long . . . as the bill of lading is held by the charterer, it would appear that the charter party terms govern") (citation omitted).

Since the Court finds that the contract of carriage is the charter party that was negotiated on Steel Coils's behalf, the Court must re-evaluate the issue of whether COGSA's $500 per package limitation applies to the cargo shipped. *See* 46 U.S.C. § 1304(5). Initially, the Court refused to apply the package limitation to Steel Coils' cargo claims because the Court found that defendant carriers were unable to carry their burden of providing *prima facie* evidence the shipper had been given a fair opportunity to avoid the limitation by declaring the value of the cargo and paying a higher freight rate. *See Steel Coils, Inc.,* 2000 WL 777916 at *2. The decision was made without the benefit of knowing the relationship between Itochu and Steel Coils and the nature of their transactions, from the procurement of the steel from the mill to the procurement of the voyage charter. The Court is unimpressed by the argument that a party like Steel Coils that is so closely tied to the procurement of the charter party can claim that the terms of the charter party are inapplicable. *See M/V ARCTIC CONFIDENCE,* 1994 WL 97787 at *3 (finding shipper that negotiated terms of

charter party had fair opportunity to declare higher package value). This is especially true since Steel Coils may have had a copy of the Voyage Charter in its possession. In an almost analogous situation, the court in M/V ARCTIC CONFIDENCE, *supra,* held that when "the party who argues that the charter party terms are inapplicable was in privity of contract as well as provided the terms which are the point of the dispute, the Court finds that the charter party terms are the terms of the contract of carriage." *Id.*

The fair opportunity doctrine reflects the intent of Congress when it enacted COGSA, the protection of shippers. *See M/V ARCTIC CONFIDENCE,* 1994 WL 97787 at *4 (citations omitted). Specifically, one of the purposes of COGSA was to eliminate the necessity for a shipper to make a detailed study of fine print clauses contained in a carrier's bill of lading in every instance before shipping a package. *See Encyclopedia Britannica, Inc. v. S/S Hong Kong Producer,* 422 F.2d 7, 11-12 (2d Cir. 1969), *cert. denied,* 397 U.S. 964, 90 S.Ct. 998 (1970). Additionally, as Steel Coils points out, the fair opportunity doctrine is intended to protect innocent holders of bills of lading who procure the documents of title through the stream of commerce. *See* Pl's Post-Trial Brief at 16.

Here, Steel Coils cannot claim that it was unaware that COGSA and its package limitation applied because the bills of lading failed to expressly or by reference incorporate COGSA. Steel Coils is not an innocent holder of the bills of lading, nor is it a shipper who was unaware of the intended terms of the bills of lading. Itochu, acting on behalf of its subsidiary Steel Coils, incorporated the package limitation into the charter party. With full knowledge of the value of the steel cargo that it had paid for,

Itochu negotiated the freight rate, which was paid by Steel Coils. The rate was based on the terms of the Voyage Charter, including the package limitation. The Court finds that Itochu, as agent for its principal Steel Coils, had a fair opportunity to declare a higher value for the cargo and to avoid the application of the package limitation. Itochu's litigation history shows that it had experience with Clause 31 of the Voyage Charter and its consequences. *See Itochu International, Inc. v. M/V HAVJO,* 1998 WL 12195, *4 (E.D. La. 1998) (finding COGSA fully incorporated into charter party that contained identical language to Clause 31 of present Voyage Charter); *Itochu International, Inc. v. M/V WESTERN AVENIR,* 1997 WL 537698, *5 (E.D. La. 1997) (same).

It is simply inequitable for Steel Coils, which directly benefitted from the lower freight rate negotiated by its agent, Itochu, to claim now that it should also benefit from the inapplicability of the package limitation. This finding is buttressed by Steel Coils' access to the charter party and by Tommas Lygrell's testimony that the parties used Itochu's forms for the bills of lading. As the testimony of Pinkert and Olivera demonstrates, the transactions between Steel Coils and Itochu were not arms length transactions. Therefore, the Court grants defendants' Rule 60 motions and finds that the package limitation applies to Steel Coils' cargo claims.

B. The COGSA Claims

Under COGSA, a plaintiff establishes a *prima facie* case by proving that the cargo for which bills of lading were issued was loaded in an undamaged condition, and discharged in a damaged condition. *See Tubacex, Inc. v.*

M/V RISAN, 45 F.3d 951, 954 (5th Cir. 1995); *United States v. Central Gulf Lines,* 974 F.2d 621, 628 (5th Cir. 1992), *cert. denied,* 507 U.S. 917, 113 S.Ct. 1274 (1993). Once the plaintiff has presented a *prima facie* case, the burden shifts to the carrier to prove that it either exercised due diligence to prevent the damage or that the loss was caused by one of the exceptions set out in Section 1304(2) of COGSA. *See id. (citing Sun Company, Inc. v. S.S. Overseas Arctic,* 27 F.3d 1104, 1109 (4th Cir. 1994)); *Tenneco Resins, Inc. v. Davy International, AG,* 881 F.2d 211, 213 (5th Cir. 1989). If the carrier rebuts the plaintiff's *prima facie* case with proof of an exception listed in Section 1304(2)(a)-(p), the burden returns to the plaintiff to establish that the carrier's negligence contributed to damage or loss. *See id.* Then, if the shipper is able to establish that the carrier's negligence was a contributory cause of the damage, the burden switches back to the carrier to segregate the portion of the damage due to the excepted cause from that portion resulting from the carrier's own negligence. *See id.*

COGSA also contains a catch-all clause upon which carriers may rely to rebut a shipper's *prima facie* case. *See* Section 1304(2)(q). This section provides that the carrier may exonerate itself from loss from any cause other than those listed in Section 1304(2)(a)-(p) by proving that the loss or damage occurred "without the actual fault and privity of the carrier . . ." *Id.* The carrier bears not only the burden of production, but also the ultimate burden of persuasion on the issue of the applicability of Section 1304(2)(q). *See United States v. Ocean Bulk Ships, Inc., et al.,* 248 F.3d 331, 338 (5th Cir. 2001).

The Court finds that Steel Coils demonstrated its *prima facie* case. First, the Court finds that the cargo was

delivered to the LAKE MARION in good order and condition. Steel Coils presented mates receipts, bills of lading containing comments on the condition of the cargo, and a cargo survey taken at the load port in Riga that contained commentary about and photographs of the cargo. (*See* Mates Receipts and Bills of Lading, Exhibits 4-7, 16, 18, 20, 22, 24, 33, 41, 50, 52, 61, 70, 79, 102; International Inspection Services, Ltd. Inspection Report No. 267//97, Exhibit 85.) Although the bills of lading and the load port survey contain notations regarding atmospheric rust on the hot rolled coils and damage to the wrapping of the cold rolled and galvanized coils, the evidence reflects that these conditions did not damage the coils. (*See* Sparks Deposition at 47-48.) Further, the Fifth Circuit has held that a finding of good condition is not precluded by exceptions on bills of lading which note rust. *See Couthino, Caro & Co., v. M/V SAVA,* 849 F.2d 166, 168 (5th Cir. 1988). Additionally, none of the exceptions refers to seawater rust damage, the damage on which plaintiff's claim is based. The only silver nitrate tests conducted on any of the cargo before loading was on hot rolled coils loaded at Ventspils, and those tests were negative. (*See* Sia Elmers Report No. AD/97-110/UJL-F, Exhibit 99.) Further, 123 wrapped coils were damaged as a result of flooding of the No. 1 hold while the vessel was in New Orleans. Although these coils also showed evidence of seawater wetting and positive silver nitrate tests (*see* Rasaretnam Deposition, at 26-28), no one disputed that the No. 1 hold did in fact flood, and the coils were damaged as a result of the flooding. Therefore, the Court finds that the exceptions on the bills of lading and the notes in the pre-load survey do not foreclose plaintiff from establishing a *prima facie* case.

Steel Coils demonstrated that the cargo was unloaded at the ports of New Orleans and Houston in a damaged condition. All of the surveyors at the discharge ports testified that the cargo was damaged when it was discharged (*see* Rasaretnam and Burges Depositions generally), and their survey reports support their testimony. (*See* Exhibits 3, 15, 78, and 89.) The testimony of the surveyors who performed damage surveys of the cargo (*see* Duval and Woods, Depositions) and their survey reports (*see* exhibits 32, 40, 48, 49, 60, 69, and 88), as well as testimony of the chemists who concluded that the rust damage was a result of seawater contamination (*see* Van der Kloot and Renz Depositions) and their respective laboratory reports (*see* exhibits 49 and 60) also support this conclusion. The Court was not persuaded by the testimony of defendant's expert, Mr. Sanchez, who maintained that the cargo was not contaminated by seawater ingress into the holds. Notably, Mr. Sanchez did not do any follow up tests on the steel after his initial observations in order to confirm the cause of the rust marks. Therefore, the Court finds that plaintiff established its *prima facie* case, thereby shifting the burden to defendants.

Once the shipper has presented a *prima facie* case, the burden shifts to the carrier to prove that it either exercised due diligence to prevent the damage or that the loss was caused by one of the exceptions set out in Section 1304(2) of COGSA. *See Tubacex, Inc.,* 45 F.3d at 945. Under COGSA, a carrier has the nondelegable duty to ensure that the ship is seaworthy before the commencement of the voyage and to "make the holds . . . fit and safe for their reception, carriage, and preservation" of cargo. 46 U.S.C. § 1303(1)(a); *see also Jamaica Nutrition Holdings, LTD. v. United Shipping Co., LTD,* 643 F.2d 376 (5th Cir.

1981) ("COGSA ... imposed a nondelegable duty on [carrier] to exercise due diligence to make the vessel fit for carriage of the cargo shipment"). Seaworthiness is defined as "reasonable fitness to perform or do the work at hand." *Farrell Lines, Inc. v. Jones,* 530 F.2d 7, 10 n. 2 (5th Cir. 1976), *rehearing denied,* 532 F.2d 1375 (1976).

The Court finds that the carriers failed to exercise due diligence to ensure the seaworthiness of the vessel before the commencement of the voyage. First, the carriers failed to test the watertight integrity of the hatch covers and to make the necessary repairs to the covers. The SKS Holds Condition Certificate reported that "[t]he hatch cover tightening rubbers are deformed (pressed inside) more or less everywhere. (*See* Exhibit 90.) Also, the ends of these rubbers are pressed out or glued out on the extremes of the hatch covers (Hold No. 3)." (*See id.*) Although the report concluded that the hatch covers were watertight, the Court concludes, based on the testimony of Captain Sparks and the surveys conducted at the discharge ports, that the hatch covers were not capable of preventing seawater from entering the holds. Further, the Court finds that the carriers had notice of deficiencies in the hatch covers that should have triggered the testing and repairs. (*See* Sparks Deposition at 62-63; Seaspan Marine Consultants Report No. 4875/97, Exhibit 100.) No tests were conducted to determine whether the hatch covers actually provided a watertight seal, and consequently no repairs were performed on the covers. Further, the carriers failed to wash the cargo holds with fresh water to remove any remaining corrosive salt residues left over from the earlier cargo. The SKS Certificate noted slightly positive silver nitrate tests on the holds before the voyage began. (*See* Exhibit 90.) Therefore, the Court finds that carriers failed

to exercise due diligence to make the vessel fit to carry the cargo.

Additionally, the Court finds that the COGSA defenses in Section 1304(2) are not applicable. First, the peril of the sea defense is inapplicable because, as both Captain Sparks and Captain Musial testified, the winds and waves encountered by the vessel were foreseeable in the North Atlantic during the late winter months (*see* Sparks Deposition at 82-83.) *See Thyssen, Inc. v. S/S EUROUNITY,* 21 F.3d 533, 539 (2d Cir. 1994) ("courts also must be cognizant that their ultimate conclusions should turn on whether the weather conditions were foreseeable, given the location and time of year."). Furthermore, no damage to the vessel resulted from the voyage because the conditions noted in the surveys at the discharge ports indicated pre-existing damage as a result of prolonged neglect. (*See* Sparks Deposition at 96-99.) Additionally, both Rasaretnam and Sparks testified that the crack in Hold No. 1 could not have been caused during the voyage because if it had, the crack would have occurred where the plates meet or where the plating meets the ship's framework, not in the middle of the plate, as was the case here. (*See* Rasaretnam Deposition at 93-95; Sparks Deposition at 115-118.)

Second, there was no showing of an act or omission by the shipper. Defendants argued that the damage resulted from deficiencies in the loading and/or stowage of the cargo. Since there was no evidence that the cargo was improperly loaded and stowed, the Court finds that this defense is inapplicable. Third, defendants failed to prove that the hatch cover deficiencies or the crack in metal plating in the No. 1 hold were latent defects. Captain Rasaretnam testified that the crack was an extension of

an old crack, as evidenced by the double plate welded in place immediately adjacent to the crack. (*See* Rasaretnam Deposition at 46-49.) Fourth, the evidence presented by defendants failed to prove that the coils were packaged improperly. Defendants' argument that the plastic sheeting used to cover the cargo was inadequate fails because plaintiff's experts established, without impeachment by defendants, that the cargo was packed in accordance with industry standards. (*See* Duval Deposition at 28-29; Rasaretnam Deposition at 23; Sparks Deposition at 46-47.) Finally, defendants failed to carry their burden to demonstrate that loading and stowage were the causes of the damage to the cargo under Section 1304(2)(q). *See Ocean Bulk Ships, Inc.*, 248 F.3d at 338. Therefore, the Court concludes that defendant carriers have failed to rebut the plaintiff's *prima facie* case. Accordingly, the Court finds that the cargo was loaded in an undamaged condition and was damaged during the voyage as a result of the carrier's failure to exercise due diligence to ensure the seaworthiness of the vessel.

C. Negligence Claim against Bay Ocean

Steel Coils asserted a general maritime negligence claim against Lake Marion's managing agent, Bay Ocean. Bay Ocean contends that COGSA provides plaintiff with its exclusive remedy and that it cannot be found liable for its independent negligence. Defendant's contentions are wrong. First, in *Herd & Co. v. Krawill Machinery Corporation,* 359 U.S. 297, 79 S.Ct. 766 (1959), the Supreme Court recognized that COGSA does not preclude independent negligence actions against the agents of a carrier when it affirmed a judgment against a negligent stevedore which had been sued separately from the shipper. *See* 359 U.S. at

308, 79 S.Ct. at 772; *see also Associated Metals and Minerals Corporation v. ALEXANDER's UNITY M/V,* 41 F.3d 1007, 1017 (5th Cir. 1995) (while COGSA governs certain aspects of claims for damages to cargo and provides carriers with certain defenses, it "does not precluded claims in tort for negligent damage to cargo."); *Citrus Marketing Board of Israel v. J. Lauritzen A/S,* 943 F.2d 220, 222-23 (2d Cir. 1991) (district court erred in dismissing complaint on basis that COGSA, standing alone, precluded a separate negligence action against vessel manager). Second, a multitude of cases have recognized that an agent in a maritime action may be fully liable for its acts of negligence. *See, e.g., Herd,* 359 U.S. at 302, 79 S.Ct. at 769; *Quinn v. Southgate Nelson Corporation,* 121 F.2d 190, 191 (2d Cir. 1941) ("That a principal is liable for a wrong does not necessarily immunize his agent.") (citations omitted); *In re Delphinus Maritima, S.A.,* 523 F.Supp. 583, 597-98 (S.D.N.Y. 1981); *Cerro Sales Corporation v. Atlantic Marine Enterprises,* 403 F.Supp. 462, 568 (S.D.N.Y. 1975) (failure of managing agent to provide a proper crew and to properly counsel about fire protection once it had assumed managerial function was negligent; vessel owner and its managing agent were jointly and severally liable to cargo claimants); *National Material Trading v. M/V KAPTAN CEBI,* 1997 WL 915000, *8 (D.S.C. 1997) (denying motion to dismiss filed by managing agent because independent cause of action may exist against manager if it was responsible to make vessel seaworthy and failed to do so). Therefore, the Court finds that plaintiff's independent tort claim against Bay Ocean is proper.

To establish maritime negligence, a plaintiff must "demonstrate that there was a duty owed by the defendant

to plaintiff, breach of that duty, injury sustained by [the] plaintiff, and a causal connection between the defendant's conduct and the plaintiff's injury." *Canal Barge Company, Inc. v. Torco Oil Company,* 220 F.3d 370 376 (5th Cir. 2000) (*quoting In re Cooper/T. Smith,* 929 F.2d 1073, 1077 (5th Cir. 1991)). Furthermore, the resultant injury must have been foreseeable. *See In re Cooper/T. Smith,* 929 F.2d at 1077. The determination of whether a party owes a duty to another depends on a variety of factors, "most notably the foreseeability of the harm suffered by the complaining party." *Id.* at 377 (*quoting Consolidated Aluminum Corporation v. C.F. Bean Corporation,* 833 F.2d 65, 67 (5th Cir. 1987)).

Here, Captain Musial testified that Bay Ocean, as managing agent of the vessel, was responsible for maintaining the condition of the vessel and for repairing any deficiencies in the vessel so that the vessel would be seaworthy for the voyage. Bay Ocean was negligent in its maintenance of the vessel's hatch covers. The SKS Holds Condition Certificate establishes that Bay Ocean was aware of the deficient conditions of the hatch covers and, as Captain Musial testified, the crew failed to perform the usual hose tests on the covers to ensure that they would function properly. (*See* Exhibit 90). The Court has already ruled that the hatch covers were in no condition to keep water out of the holds, and therefore, seawater ingress and the resultant damage to plaintiff's cargo was foreseeable. *See* discussion, infra. at 30. Furthermore, the surveyors' reports and testimony demonstrate that the seawater that damaged the steel was able to enter the holds because of the deficient conditions of the hatch covers, and therefore establish the causal link between the seawater damage and the failure of Bay Ocean to maintain and repair the

hatch covers. (*See* Exhibits 32, 49, 60, 88; Depositions of Rasaretnam, Woods, Burges, Renz.) Therefore, the Court finds that Bay Ocean was negligent in its maintenance of the vessel.

D. Liability and Damage Calculations

Under COGSA, a cargo owner may recover only from the carrier of goods. *See Thyssen Steel Company v. M/V KAVO YERAKAS,* 50 F.3d 1349, 1351 (5th Cir. 1995) (citations omitted). A "carrier" is "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C. § 1301(a). Neither Lake Marion nor Western Bulk disputes its status as a carrier. Both Lake Marion and Western Bulk are entitled to limit their liability to COGSA's $500-per package limitation. The question remains whether Bay Ocean, Lake Marion's managing agent, may also rely on the package limitation.

In *Herd,* the Supreme Court held that while the $500-per-package limitation of COGSA does not extend to stevedores or agents of the carrier, a carrier is free to contract with the owner of cargo to limit the liability of the carrier's agents. *See Herd,* 359 U.S. at 302-305, 79 S.Ct. at 769-771; *see also Brown & Root,* 648 F.2d at 422-423 (discussing limit of liability for stevedores under Himalaya clause); *Secrest Machine Corp. v. S.S. TIBER,* 450 F.2d 285, 286 (5th Cir. 1971) (per curiam). In determining whether to extend the protection of the package limitation beyond the carrier, the Court must be guided by the principle that "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries." *Herd,* 359 U.S. at 305, 79 S.Ct. at 771.

Plaintiff argues that Bay Ocean, as a non-carrier whose liability sounds in negligence, is not entitled to limit its liability under the package limitation incorporated in the charter party. Bay Ocean has pointed to no provision, such as a Himalaya clause, in any of the relevant documents that purports to extend the per-package limitation to the carrier's agents. Accordingly, the Court finds that Bay Ocean's liability is not limited by COGSA's per-package limitation.

Subject to the package limitation, Lake Marion, Bay Ocean, and Western Bulk are liable jointly and *in solido* to plaintiff for the losses it sustained as a result of the damage to the cargo because a fair allocation of liability cannot be made among the defendants. *See Project Hope v. M/V IBN SINA,* 250 F.3d 67, 76 (2d Cir. 2001) (recognizing that "[w]here a fair allocation of liability cannot be made among multiple tortfeasors, the federal common law permits imposition of joint and serval liability." (citation omitted); *see also Rockwell International Corp. v. M/V INCOTRANS SPIRIT,* 998 F.2d 316, 319 (5th Cir. 1993) (applying comparative fault principles to maritime claims). Lake Marion and Western Bulk are liable for breach of the duty to exercise due diligence to ensure that the vessel was seaworthy. *See Constructores Tecnicos v. Sea-Land Service, Inc.,* 945 F.2d 841, 850 (5th Cir. 1991). Bay Ocean is liable for its negligence in failing to test and repair the hatch covers.

The Court finds that the total number of packages that were damaged was 524. Through the introduction of statements of adjustment made by Sumitomo Marine, plaintiff's insurance company, plaintiff demonstrated that 170 coils that were discharged in New Orleans sustained damages. (*See* Exhibits 2,14,30,39, and 47.) In the same

manner, plaintiff also demonstrated that 354 coils and plates discharged in Houston were damaged. (*See* Exhibits 59,68, and 77.) Steel Coils' total loss is $505,358.94. As limited by the $500 per-package limitation, the total liability of Lake Marion and Western Bulk is $262,000. Bay Ocean is liable for the full $505,358.94.

Plaintiff has a duty to mitigate damages such as by selling the damaged goods at salvage for the best price obtainable. *See Tennessee Valley Sand & Gravel Co. v. M/V DELTA,* 598 F.2d 930, 932 (5th Cir. 1979); *Compagnie De Navigation Fraissanet & Cyprien Fabre, S.A. v. Mondial United Corp.,* 316 F.2d 163, 171 (5th Cir. 1963); *see also* Schoenbaum, *supra,* § 10-36 at 170. Essentially, the injured party must act reasonably under the circumstances to limit the extent of its damages. *See M/V DELTA,* 598 F.2d at 932. First, the Court finds that Steel Coils properly mitigated its damages as evidenced by deposition testimony of surveyors Woods and Duval. They testified that Steel Coils obtained fair and reasonable prices on the salvage market for the cargo discharged in New Orleans. (*See* Woods Deposition at 20-21,27,30-32; Duval Deposition at 61-62.) Defendants contend that plaintiff failed to act reasonably because it "slit" (cut coils into smaller pieces) coils before they were inspected by surveyors, which decreased the marketability of the pieces after they were rejected. Although the Court agrees that the value of the steel decreased as a result of the slitting, the Court nevertheless finds that slitting the coils was reasonable under the circumstances because, as Pinkert testified, Steel Coils slit the steel in order to conform the coils to customers' specifications. (*See* Pinkert Deposition at 33.)

Plaintiff is also entitled to recover reasonable expenses incurred in determining the nature and extent of the loss, including survey fees. *See Orduna S.A. v. Zen-Noh Grain Corp.,* 913 F.2d 1149, 1154 (5th Cir. 1990) (upholding district court's allowance of plaintiff's recovery of survey fees); *Shiboumba Overseas, LTD. v. M/V PIONEER SEVERODVINSKA,* 1997 WL 675320, *6 (E.D. La. 1997); *Sugar Industry Authority v. M/V TRADE WINDS,* 1992 WL 116100, *8 (E.D. La. 1992); *see also* Schoenbaum, *supra,* § 10-36, at 172. The Court finds that Steel Coils is entitled to $25,272.54 in survey fees for the surveys conducted in New Orleans ($12,228.38) and Houston ($13,044.16) to determine the nature and extent of the loss.[2] *See id.*

Pre-judgment interest from the date of the loss is the rule rather than the exception in admiralty cases. *See Todd Shipyards Corp. v. Turbine Services, Inc,* 674 F.2d 401, 415 (5th Cir.), *cert. denied,* 459 U.S. 1036, 103 S.Ct. 447 (1982); *In re M/V VULCAN,* 553 F.2d 489, 490 (5th Cir.), *cert. denied,* 434 U.S. 855, 98 S.Ct. 175 (1977). The Court finds that there are no peculiar circumstances in this case that would make it inequitable for defendants to pay pre-judgment interest. *See Probo II London v. M/V ISLA SANTAY,* 92 F.3d 361, 363 n. 2 (5th Cir. 1996) (*citing Reeled Tubing, Inc. v. M/V CHAD G,* 794 F.2d 1026, 1028 (5th Cir. 1986)); *Todd Shipyards Corp.,* 674 F.2d at 41; *In re M/V Vulcan,* 533 F.2d at 490-91. Admiralty courts have

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[2] Defendants did not contest the reasonableness of the surveys nor the cost of the surveys submitted by plaintiff and supported by surveyors Woods and Duval. (*See* Woods Deposition at 20-21, 27, 30-32; Duval Deposition at 61-62, 46-49.)

broad discretion in setting the rate of pre-judgment interest and may use any reasonable guidepost which provides a fair level of compensation, including state law. *See Randolph v. Laeisz,* 896 F.2d 964, 969 (5th Cir. 1990); *Marine Overseas Services Inc. v. CrossOcean Shipping Co.,* 791 F.2d 1227, 1236 (5th Cir. 1986); *Reeled Tubing Inc.,* 794 F.2d at 1029. Accordingly, the Court awards pre-judgment interest from the date of delivery in New Orleans, the discharge port where the first cargo claims arose, at the rate established by Louisiana Civil Code art. 2924(B). Pursuant to Federal Rule of Civil Procedure 54(d), plaintiff is also permitted to recover costs.

E. The Cross-Claim, Counter-Claim, and Third-Party Complaint

Lake Marion and Bay Ocean assert a cross-claim against Western Bulk as the charterer of the vessel for indemnity, contribution and recovery based on alleged breaches of the Time Charter. Western Bulk, in turn, filed a cross-claim against Lake Marion and Bay Ocean on the same grounds, and it filed a counter-claim against Steel Coils and a third-party complaint against Itochu, based on the terms of the Voyage Charter.

Lake Marion and Bay Ocean assert their cross-claim against Western Bulk based on three theories: (a) that Western Bulk is responsible for cargo damage caused by condensation because the Time Charter incorporated the New York Produce Exchange Agreement, which apportions cargo damage caused by condensation 50% to owners and 50% to charterers (See Exhibit 111); (b) that Western Bulk, as charterer under the Time Charter, was responsible for

loading and stowage of the cargo and is therefore responsible for any damages caused by such acts; and (c) that Western Bulk is liable for any damage amounts above the package limitation because under the terms of the charter party, Western Bulk was responsible for including COGSA, or a reference to it, in the bills of lading. As to claims regarding responsibility for the damages to the cargo, the Court dismisses both claims because, as discussed above, the Court finds that the damage to the cargo resulted from the unseaworthiness of the vessel, not from any defects in loading or stowage or from condensation. *See* discussion, *infra.* at 25-33. Finally, because the Court has determined that the package limitation applies to Steel Coils' cargo claims, Lake Marion's third claim is moot. Bay Ocean has no claim against Western Bulk because Western Bulk had no duty to extend COGSA defenses to Lake Marion's agents. Accordingly, the cross-claims of Lake Marion and Bay Ocean are rejected.

Western Bulk's counterclaim and third-party complaint are based on the theories that the damage to the cargo resulted from improper loading and stowage, for which Itochu and/or Steel Coils is responsible, and because Steel Coils and/or Itochu failed to fulfill their obligations under the charter party by improperly issuing the bills of lading without reference to COGSA and the package limitation. These claims are dismissed on the same grounds as stated above for denying Lake Marion's and Bay Ocean's claims against Western Bulk. *See* discussion, *infra* at 42-43.

As to Western Bulk's cross claim, Western Bulk is entitled to indemnity from Lake Marion for any amount it pays to plaintiff for the damage that resulted from the unseaworthiness of the vessel because the New York

Produce Exchange, which is incorporated in the Time Charter at Clause 53, apportions 100% of "[c]laims for loss of or damage to cargo due to seaworthiness" to "Owners." (Exhibit 111.)

Accordingly,

IT IS ORDERED that there be a judgment in favor of plaintiff Steel Coils against M/V LAKE MARION, her engines, boilers, tackle, *in rem,* and Lake Marion, Bay Ocean and Western Bulk *in personam* jointly, severally, and *in solido* in the amount of $262,000, with pre-judgment interest from April 8, 1997, plus costs.

IT IS FURTHER ORDERED that Bay Ocean is liable to Steel Coils for an additional amount of $243,358.94, plus pre-judgment interest.

IT IS FURTHER ORDERED that Lake Marion's cross-claim against Western Bulk is dismissed with prejudice.

IT IS FURTHER ORDERED that Western Bulk's counter-claim and third-party claims against Steel Coils and Itochu are dismissed with prejudice, respectively.

IT IS FURTHER ORDERED that Western Bulk is entitled to indemnity from Lake Marion for any amount it pays to plaintiff.

New Orleans, Louisiana, this 29th day of November, 2001.

/s/ Sarah Vance
SARAH S. VANCE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEEL COILS, INC.	CIVIL ACTION
VERSUS	NO. 98-3116
M/V LAKE MARION, ET AL.	SECTION "R"(1)

JUDGMENT

(Filed Nov. 29, 2001)

Considering the Court's order and reasons on file herein,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered in favor of plaintiff Steel Coils against M/V LAKE MARION, her engines, boilers, tackle, *in rem*, and Lake Marion, Bay Ocean and Western Bulk *in personam* jointly, severally, and *in solido* in the amount of $262,000.00, with pre-judgment interest from April 8, 1997, plus costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Bay Ocean is liable to Steel Coils for an additional amount of $243,358.94, plus pre-judgment interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Lake Marion's cross-claim against Western Bulk is dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Western Bulk's counter-claim and third-party claims against Steel Coils and Itochu are dismissed with prejudice, respectively.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Western Bulk is entitled to indemnity from Lake Marion for any amount it pays to plaintiff.

New Orleans, Louisiana, this 29th day of November, 2001.

/s/ Sarah Vance
SARA S. VANCE
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
SEP 12 2003
OFFICE OF THE CLERK

No. 03-232

IN THE

Supreme Court of the United States

BAY OCEAN MANAGEMENT, INC.,

Petitioner,

v.

STEEL COILS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent takes issue with the Questions Presented by petitioner for the following reasons:

Petitioner's first stated Question, is, "Does the Carriage of Goods by Sea Act (COGSA) provide the exclusive remedy for cargo damage against the vessel and its manager?" The only Petitioner here is the vessel's manager, Bay Ocean Management, Inc. Although the vessel, M/V LAKE MARION, was sued *in rem*, neither the defendant vessel nor its owner have petitioned for a writ of *certiorari*. Thus, this issue should be limited to the vessel manager alone.

Petitioner's second Question confuses the respective duties of the COGSA carrier and the non-carrier manager. However, that confusion will be addressed in the Argument to follow.

Petitioner's third question is premised on a misstatement of the law. There is no split in the Circuits as to whether a non-carrier, vessel manager can be sued in tort outside the confines of COGSA. This Court and the lower federal courts, which have addressed this question, have unanimously answered it in the affirmative.

PARTIES TO THE PROCEEDING

The following are parties to this proceeding:

1. Steel Coils, Inc.
   Plaintiff/Respondent

2. Bay Ocean Management, Inc.
   Defendant/Petitioner

3. M/V LAKE MARION in rem
   Defendant

4. Lake Marion, Inc.
   Defendant

5. Western Bulk Carriers K/S Oslo
   Defendant/Third Party Plaintiff

6. Itochu International, Inc.
   Third Party Defendant

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent, Steel Coils, Inc., is no longer in existence. Steel Coils, Inc. discontinued doing business in 2001. The instant case is being pursued in Steel Coils, Inc.'s behalf by Mitsui Sumitomo Insurance Co., Ltd., successor to The Sumitomo Marine and Fire Insurance Company, Limited, the subrogated cargo insurer of Steel Coils, Inc. Mitsui Sumitomo Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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SUMMARY OF THE ARGUMENT

Petitioner has failed to establish a basis for this Court to issue a writ of *certiorari* as established by the applicable criteria set forth in Supreme Court Rule 10. The Fifth Circuit's decision below did not conflict with a decision of another United States Court of Appeals on the same matter. Moreover, the decision below does not conflict with the decision by any state court of last resort. Finally, the decision below has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by a lower court.

Petitioner has misstated the law in suggesting that a conflict exists among the Circuits on the issue of a non-carrier's liability in tort for its own negligence. No such conflict exists because the cases Petitioner relies upon do not stand for the proposition for which Petitioner cites them. Petitioner has failed to provide any authority in support of its interpretation of the Carriage of Goods by Sea Act, 46 U.S.C. § 1300, *et seq.* (COGSA).

The relief Petitioner seeks would require a revision of COGSA. Such a legislative revision is not the function of this Court. Moreover, managers like Petitioner may be afforded the protection of COGSA through the use of a clearly worded Himalaya Clause. Here, the carriers simply failed to include a Himalaya Clause in the contract of carriage.

REASONS FOR DENYING THE PETITION

A. *Petitioner has Failed to Establish a Basis for Issuance of a Writ of Certiorari*

No Conflict Among the Circuits

In the District Court below, Respondent filed a COGSA claim against the ocean carriers and a separate tort cause of action against the Petitioner alleging negligence. Petitioner argues that this Court should grant *certiorari* because of an alleged split between the Fifth and the Eleventh Circuits regarding whether a cargo owner can bring a separate tort action against a negligent, non-carrier. In support of its erroneous assertion, Petitioner relies upon two Eleventh Circuit cases: *Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Co., Ltd.*, 215 F.3d 1217 (11th Cir. 2000), and *Hayes-Leger Assocs., Inc. v. M/V ORIENTAL KNIGHT*, 765 F.2d 1076 (11th Cir. 1985). Neither case supports Petitioner's argument.

Polo did not involve a claim against a non-carrier. Rather, in *Polo* the cargo owner sought damages from *the carrier* alone for cargo lost overboard while in transit. The cargo owner filed claims against *the carrier* for breach of contract, bailment and negligence. The *carrier* filed a motion for summary judgment on the contract claim, or in the alternative to limit its liability to the value of the goods shipped to the manufacturer. The district court granted the *carrier's* motion for summary judgment on the contract claim because the cargo owner was not a party to the bill of lading. It also granted the *carrier* summary judgment on the bailment and negligence claims, ruling correctly, that cargo's claim against

the *carrier* was preempted by COGSA. Thus, *Polo* only addresses cargo's claim against a *carrier*; not a non-carrier.

The fatal flaw in Petitioner's argument that *Polo* creates a conflict here, is that it improperly lumps together claims against carriers with claims against non-carriers in its reference to "cargo damage cases such as these."[1] Petitioner either fails to recognize or deliberately ignores the fact that these are two separate types of claims: claims against carriers, which are covered exclusively by COGSA[2] and; negligence claims against non-carriers, such as agents, stevedores and managers, which sound in tort such as that brought by Respondent against Petitioner here. *Polo* stands only for the proposition that, where COGSA applies, it exclusively covers claims against "carriers." However, it does not address the availability of tort claims against non-carriers like Petitioner.[3]

In the *ORIENTAL KNIGHT*, the plaintiff's cargo was carried in five containers. Upon opening the containers at

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1. *See* Petition for Writ of *Certiorari*, p. 8.

2. Cargo claims are widely recognized as "hybrid" claims of tort and contract. (*See, e.g., Polo, supra*, p. 1220-1221; *Associated Metals & Minerals Corp. v. M/V ALEXANDER'S UNITY*, 41 F.3d 1007 (5th Cir. 1995); *Oriente Commercial, Inc. v. The American Flag Vessel*, 529 F.2d 223 (4th Cir. 1975).)

3. Petitioner acknowledges that in *Polo*, "not exactly the same fact situation was present . . . as is present here." However, Petitioner glosses over the seminal difference that, in fact, *Polo* did not address non-carrier liability. Instead, Petitioner suggests that, ". . . the different philosophies amongst the Circuits is readily apparent." (Petition for Writ of *Certiorari*, p. 8.) Petitioner fails to explain how the Circuits' respective philosophies differ or how that is relevant, let alone how a case that does not address non-carrier liability in tort creates a conflict with the instant case.

the time of delivery, it was discovered that the goods had been damaged as a result of seawater entering the containers. As the Eleventh Circuit pointed out, the sole issue on appeal was whether the district court failed to properly apply section 4(5) of COGSA; that is, whether each of the five containers constituted a COGSA "package" for purposes of applying the $500 per package liability limitation. There, the cargo plaintiff evidently employed the oft-used "scattershot" technique of suing every entity associated with the carriage transaction; filing five separate suits; all of which were consolidated for trial.[4] However, the Eleventh Circuit's opinion did not indicate that cargo brought a separate tort cause(s) of action against the vessel's manager. In fact, nowhere in the Eleventh Circuit's opinion did it even address the manager's tort liability. Simply put, the *ORIENTAL KNIGHT* has no bearing on the issue Petitioner has raised.

Neither of the two cases that Petitioner relies upon support its argument that there is a split among the Circuits on the issue of non-carrier liability. Neither case even discusses the issue. Petitioner has therefore, failed to demonstrate any split among the Circuits as contemplated by Rule 10(a).

No Conflict with a Decision by a State Court of Last Resort

The next enumerated criterion in Rule 10(a) is that the Circuit court, "has decided an important federal question in a way that conflicts with a decision by a state court of last

4. The Eleventh Circuit's opinion appears to suggest that individual suits were commenced on each of the five bills of lading that were issued. (*See ORIENTAL KNIGHT*, page 1081.)

resort." Petitioner has identified no such conflicts with a decision by any state court of last resort.

No Departure from Accepted and Usual Course of Judicial Proceedings

The final enumerated criterion in Rule 10(a) is that the Circuit court, "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Petitioner has not alleged that the Fifth Circuit has departed from the accepted and usual course of judicial proceedings.

Distilled to its essence, Petitioner's argument is that the Fifth Circuit misapplied a properly stated rule of law; that a non-carrier, vessel manager can be held fully liable in tort for cargo damage caused by its negligence. Although the Fifth Circuit's decision is unquestionably a proper application of well-settled law, Rule 10 specifically notes that a writ of *certiorari* is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Thus, even if the Fifth Circuit had misapplied the rule of law (which is clearly not the case), Rule 10 would not provide a basis for the Court's exercise of jurisdiction.

Petitioner has, therefore, failed to identify any basis for this Court to exercise its discretion to assert jurisdiction over this matter. To the contrary, Rule 10 suggests that granting *certiorari* in cases of this sort is rare. This case presents nothing so unique as to warrant a departure from that rubric. Therefore, the Petition for Writ of *Certiorari* should be denied summarily.

B. *Fifth Circuit's Decision is Consistent with Supreme Court and Other Circuits*

The Fifth Circuit's decision is based in large part upon, and is completely consistent with, this Court's decision in *Robert C. Herd v. Krawill Machinery Corporation*, 359 U.S. 297, 79 S. Ct. 766 (1959) and its progeny. In *Herd*, like the instant case, the cargo owner brought a tort action against a non-carrier, agent of the carrier (there a stevedore), for damage caused by the non-carrier's negligence. In another parallel to the instant case, in *Herd* the District Court found (and the U.S. Fourth Circuit Court of Appeal unanimously agreed) that the damage was caused by the agent's negligence; that the limitation of liability provisions of the bill of lading were, in express terms, applicable only to the carrier and did not apply to nor limit the agent's liability; and that the agent was liable for the full amount of the loss. Relying in part on its own prior decision in *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575 (1943), this Court held that the carrier's agent was liable for its own negligence, and that the carrier's agent could not avail itself of the carrier's right to limit its liability under COGSA § 1304(5).[5]

In *Herd*, this Court reviewed the legislative history of COGSA and observed that section 1301(a) clearly defines "carrier" to include, "the owner or the charterer who enters into a contract of carriage with the shipper."[6] Moreover, this Court noted that COGSA § 1302, 1303 and 1304 impose particularized duties and obligations upon, and grants stated immunities to, the "carrier." Further COGSA § 1304(5) says

5. *See Tulane Maritime Law Journal*, Vol. 27, Number 2, Summer 2003, p. 648.

6. *Herd*, 359 U.S. 297 at p. 301.

that, "neither the carrier nor the ship shall be liable for more than $500 per package." As this Court stated, COGSA, ". . . makes no reference whatever to stevedores *or agents*." (emphasis added).[7]

Herd also pointed out that the legislative history of COGSA shows that it was, ". . . lifted almost bodily from the Hague Rules of 1921,"[8] the effort of which was, ". . . to establish the rights and liabilities of carriers and shippers *inter se* in international trade."[9] Further, the Court's review of COGSA's legislative history revealed, "nothing in the language, the legislative history or environment of the Act that expressly of impliedly indicates any indication of Congress to regulate stevedores or other agents of the carrier, or to limit the amount of their liability for damages caused by their negligence."[10] The Court could not have spoken more clearly than when it pronounced,

"Those Rules do not advert to stevedores or agents of a carrier."[11]

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*, pp. 301-302. (*See also, Citrus Marketing Board of Israel v. J. Lauritzen A/S*, 943 F.2d 220 (2d Cir. 1991) and *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*, 403 F. Supp. 562, 568 (S.D.N.Y. 1975) ("An agent of the carrier is not covered by the limitations of COGSA available to the carrier, and may be fully liable for its acts of negligence."))

11. *Id.*, p. 301. Notably, the Eleventh Circuit's opinion in *Polo* agreed that the purpose of COGSA was to achieve a balance between the respective rights and obligations of shippers and *carriers*. (215 F.3d 1217, 1220.)

C. *Petitioner Seeks a Revision of COGSA*

Based on nothing more than its own bald assertion that the way in which the shipping industry operates has changed substantially since COGSA was enacted in 1936, Petitioner seeks this Court's reversal of *Herd* and/or a revision of COGSA to expand its defenses and liability limitations to agents of the carrier.[12] The sweeping action Petitioner proposes is both unwarranted and unnecessary.[13] The situation in which Petitioner finds itself here is one which it and the carriers created, and one that was avoidable. Here, the carriers failed to employ a clearly worded Himalaya Clause of the type that has been widely used in the shipping industry for decades. Thus, it is not necessary for this Court to consider the reversal of 44 years of precedent that Petitioner requests.

Without any evidentiary support, Petitioner suggests that "nowadays" most vessels are owned by separate one-ship companies, and that all of the duties COGSA imposes on carriers/owners of such vessels are carried out by managers

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12. Petitioner later says, in the Conclusion of its Petition, that the industry has gone through significant changes since the *Herd* decision in 1959. It is, therefore, difficult to determine what period Petitioner is referring to (1936 to present, or 1959 to present), what industry changes Petitioner is concerned about or when Petitioner thinks things changed so drastically to require this Court to reverse its prior decision.

13. Unquestionably, inequities are presented by contemporary application of the 1936 COGSA. The most glaring inequity is the $500 per package limitation, which has remained unchanged for 67 years. If any section of COGSA demands revision, it is that. However, revision of COGSA is the function of Congress, not the Judiciary.

or other agents, like Petitioner.[14] Therefore, Petitioner argues, managers (and, by logical extension, *any* agents of a carrier who perform a "carrier" duty) should have the benefit of COGSA's per package limitation (and presumably all the other "carrier" defenses the Act provides.) Pretermitting the accuracy of Petitioner's unsupported factual assertions, this argument is baseless and ignores this Court's holding in *Herd*.

Herd Controls

COGSA imposes on the carrier the duties to properly and carefully load, handle, stow, . . . and discharge the cargo.[15] In *Herd*, the carrier hired a stevedore to load, handle and stow the cargo at the load port. The loss resulted from the carrier's agent's negligence in performing these "carrier" duties. The cargo owner sued the negligent agent in tort. This Court found that the agent was not a "carrier" because it was not a vessel owner or charterer who entered into a contract of carriage with the shipper. Therefore, the Court determined that, for all of the reasons described above, the carrier's agent could not avail itself of the carrier's per package liability limitation under COGSA § 1304(5).

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14. The "one-ship" model is a scheme developed by ship owners to reduce their financial risk by putting each vessel in the ownership of single entity so that in the event of a catastrophic loss, the registered owner's liability is effectively limited to the value of the ship, regardless of whether the "owner" can limit its liability under the Limitation of Liability Act, 46 U.S.C. §§ 181-189. As part of this arrangement, the vessel is managed by a separate entity (like Petitioner here), which generally has few, if any, assets of its own.

15. 46 U.S.C. § 1303(2).

Here, like in *Herd*, Petitioner contracted to perform several of the COGSA carrier's duties pursuant to its management agreement with the vessel owner, Lake Marion, Inc. The duties Petitioner contractually undertook included, but were not limited to, ensuring that the hatch covers and closing appliances were kept in good repair and that the holds were properly prepared to receive the intended cargo.[16] The management agreement did not relieve the carrier of its obligation to cargo to perform its statutory duties. Rather, as in *Herd* the carrier simply hired a third party to perform them. Also like the cargo owner in *Herd*, Respondent sued the non-carrier agent in tort, and the lower courts found that Petitioner was negligent and was not a "carrier" because it was not a vessel owner or charterer who entered into a contract of carriage with the shipper. The District Court found, and the Fifth Circuit agreed, that Petitioner was negligent in its performance of the duties it undertook and that said negligence caused the subject damages. Consequently, like in *Herd*, the agent was not able to take advantage of the carriers' liability limitation. *Herd* controls here because there, as here, the non-carriers contractually undertook to perform certain "carrier" duties; and in both cases the non-carriers were held liable to the cargo owner (without recourse to COGSA's carrier defenses) for damage to the cargo caused by their negligence in performing those duties. In neither case did the agent supplant the carrier. As evidence of this, here the carriers were found liable for the damage, but were able to avail themselves of COGSA's carrier liability limitation. Rather, in both cases, the agent simply contractually undertook to perform some of the carrier's duties.

16. However, contrary to its argument, Petitioner did not undertake *all* of the carriers' COGSA duties. For example, Petitioner did not load, stow or discharge the cargo. (*See*, COGSA, 46 U.S.C. § 1303(2)).

In *Herd*, this Court rejected precisely the same argument that Petitioner seeks to advance here. That argument was based on the Fifth Circuit's decision in *A.M. Collins & Co. v. Panama R. Co.*[17] The Supreme Court granted *certiorari* in *Herd* to resolve the conflict between the Fifth Circuit's holding in *Collins* and the Fourth Circuit's affirmance of the District Court's ruling in *Herd*. (As is noted above, no similar conflict between the Circuits exists here.) The Supreme Court found that *Collins* was, ". . . counter to a long-settled line of decisions of this Court" noting that, "From its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged."[18] Here, no statute or valid contract binding on the person damaged exonerates Petitioner from the consequences of its negligence. Therefore, the same result as in *Herd* obtains.

Petitioner is Not a Carrier

Petitioner signed the Time Charter between its principal, the vessel owner, Lake Marion Inc., and time charterer, Western Bulk Carriers K/S, for Lake Marion, Inc. "AS AGENT ONLY." Petitioner signed "AS AGENT ONLY" because it clearly wanted to avoid the legal consequences of carrier status. Therefore, Petitioner was not a "carrier" of the cargo and could not avail itself of the carrier's per package liability limitation.

Petitioner assiduously avoided "carrier" status because COGSA not only imposes specific duties on carriers, but it

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17. 197 F.2d 893 (5th Cir. 1952).

18. 79 S. Ct. 766 (1959), at 770.

also creates presumptions that apply in COGSA's shifting burden of proof scheme.[19] For instance, where, as here, seawater damages the cargo, a presumption arises that the carrier has breached its duty to use due diligence to ensure that the vessel was seaworthy at the commencement of the voyage. The carrier must then carry the burden of proof to rebut that presumption. It must show that the unseaworthiness was not the result of a lack of due diligence at or before the commencement of the voyage, and/or that the loss resulted from one of COGSA's enumerated perils.[20]

By contrast, in a tort claim against a non-carrier, like Petitioner, cargo cannot rely on any presumption, even where seawater damage occurs. Instead, as Respondent did in the District Court in the instant case, cargo must carry the substantial burden of proving actual negligence on the part of the non-carrier.[21] Therefore, in the District Court, it was in Petitioner's best interest to avoid "carrier" status in order to require Respondent to prove actual negligence. Only *after* the District Court determined that Petitioner's negligence caused the damage and that Petitioner was liable in tort

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19. *See*, *Tulane Maritime Law Journal*, Vol. 27, Number 2, Summer 2003, p. 652.

20. *See, e.g.*, *Marubeni Transatlantic Marine Claims Agency, Inc. v. M/V OOCL INSPIRATION*, 137 F.3d 94 (2d Cir. 1998); *Jefferson Chemical Co. v. M/T GRENA*, 413 F.2d 864 (5th Cir. 1969); *Trade Arbed, Inc. v. M/V SWALLOW*, 688 F. Supp. 1095 E.D. LA 1988); *International Produce, Inc. v. S.S. FRANCES SALMAN*, 1975 A.M.C. 1521 (S.D.N.Y. 1975).

21. *See*, *Tulane Maritime Law Journal*, Vol. 27, Number 2, Summer 2003, p. 652. ("The difficulty of proving fault, especially when the negligence occurs at sea, may explain why tort claims against the vessel managers are infrequent.")

without benefit of the carriers' $500 liability limitation (and the Fifth Circuit agreed), did Petitioner decide that it would be better off being treated as a COGSA carrier.[22] To that end, Petitioner now seeks to have this Court overrule *Herd* and expand the definition of "carrier" to include non-carriers who undertake to perform the duties that Congress assigned to carriers in enacting COGSA. This Court has previously rejected similar attempts. There is no reason to expand COGSA now.

COGSA's Wording is Clear

Alternatively, Petitioner makes an unsupported attempt to manipulate COGSA's definition of "carrier" in an unreasonably expansive way. COGSA defines "carrier" as follows, "*The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.*" (COGSA § 1301(a)). Petitioner argues that this definition is unclear and open-ended because of the use of the word "includes." To Petitioner the word "includes" implies that there may be other entities that fit within the definition. Notably, Petitioner fails to cite a single authority that endorses this view.[23]

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22. *E.g.*, in its Eleventh Defense to Respondent's original Complaint, Petitioner stated that it was **not** a carrier of the goods.

23. Morever, had Congress intended "*includes*" to be open ended so as to refer to non-carriers, as Petitioner argues, it would likely have used the phrase, "*but is not limited to*" immediately after, and to modify "*includes*." This commonly used legal phrase shows that a list is not exclusive; a device that was surely known to the drafters. Petitioner offers no explanation why Congress would not have used such a simple phrase if its intent was to include entities other than the owner or charterer who enters into a contract of carriage with the shipper in the definition of "*carrier*."

The plain reading of the statute is that the term "carrier" *includes* two categories of entities: a.) owners and/or; b.) charterers. The clear wording of the statute immediately modifies the words, "*the owner or the charterer*" with the phrase, "*who enters into a contract of carriage with a shipper.*"[24] Therefore, Congress intended COGSA to apply only to the carrier; ie., the owner or charterer who has entered into a contract of carriage with a shipper. Non-carriers are all other parties who have not entered into such a contract of carriage. As this Court pointed out in *Herd* the Legislative History of COGSA reveals no indication that Congress intended to protect non-carriers under COGSA.[25]

Petitioner continues this manipulation by taking a single phrase from COGSA out of context and suggesting that the reference in that phrase to, "*or other persons*", means that entities other than carriers are covered by the Act. Again, Petitioner cites no authorities in support of this argument. Moreover, Petitioner ignores the overwhelming weight of authority from his Court, lower courts and commentators that COGSA applies only to carriers.[26] Further, Petitioner does not provide even the full text of the sentence from which it extracted the phrase. The quoted phrase comes from the last sentence of Section 1304(1), which reads as

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24. *See, e.g., Herd, supra*; *Citrus Marketing, supra.*

25. *See also Tulane Maritime Law Journal*, Vol. 27, Number 2, Summer 2003, p. 652.

26. *See, e.g., Herd, supra*; *Citrus Marketing, supra*; *Polo, supra*; Schoenbaum,T. J., *Admiralty and Maritime Law*, Third Edition, Vol. 2, Sec. 10-15; *see also* Reilly, Mary T., "*Identity of the Carrier: Issues Under Slot Charters*" Tulane Maritime Law Journal, Vol. 25, No. 2, Summer 2001, p. 505.

follows, "*Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.*" (COGSA § 1304(1).) This sentence simply establishes where the burden of proving due diligence lies in a case where unseaworthiness has been shown to be the cause of the loss. Notably, earlier in section 1304, the statute refers to "*the carrier nor the ship.*" Since the last sentence only refers by name to the carrier, a simple reading of the phrase "*or other persons*" in the context of the entire section, is that it means the ship. There is no support whatsoever, for the suggestion that the use of the phrase "*or other persons*" opens COGSA's doors to non-carriers.

Petitioner's argument that COGSA's "error in navigation" defense[27] creates a dilemma is similarly groundless. Regardless of who employs the vessel's Master, if the loss is caused by an error in navigation, the carrier(s), (ie., the owners and/or charterer who entered into a contract of carriage with the shipper) would be entitled to the defense.[28] However, the error in navigation defense is not at issue in this case. Moreover, any perceived "dilemma" that might arise, can be prevented by inclusion of a clearly worded Himalaya Clause in the bill of lading and/or contract of carriage. As the lower courts observed, there was no Himalaya Clause in any of the critical documents here.

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27. 46 U.S.C. § 1304(2)(a)).

28. *See, e.g., Folger Coffee Co. v. OLIVEBANK*, 201 F.3d 632 (5th Cir. 2000).

Petitioner's Failure to Include Clearly Worded Himalaya Clause

For several decades carriers have inserted clauses into contracts of carriage which expand the coverage of COGSA to parties other than the "carrier." These so-called Himalaya Clauses are named after the ship that was involved in the landmark Australian case of *Adler v. Dickinson*, [1955] 1 Q.B. 158, which found that the limitations of liability afforded to a carrier by a contract of carriage can be extended to the carrier's agents, employees and contractors. Courts addressing Himalaya Clauses have generally held that they must be strictly construed and that they must be clearly worded.[29] In *Citrus Marketing*, *supra*, the Second Circuit discussed whether a Himalaya Clause could extend to a vessel manager. The court stated that it, "perceived no principled basis for excluding such an application in an appropriate case."[30] Presumably, an "appropriate case" would be one where the manager was specifically mentioned in the Himalaya Clause.

Here, however, there was no Himalaya Clause at all in the bill of lading or in any relevant charter party. Petitioner goes to great lengths to point out that it was the "personification" of the registered vessel owner and that the owner could enter into contracts only under the auspices of the manager. If such is the case, Petitioner was responsible

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29. *See, e.g., Institute of London Underwriters v. Sea land Service, Inc.*, 887 F.2d 761 (9th Cir. 1989); *Certain Underwriters at Lloyd's v. Barber Blue Sea Line*, 675 F.2d 266 (11th Cir. 1982); *Brown & Root, Inc. v. M/V PEISANDER* , 648 F.2d 415 (5th Cir. 1981); *Tessler Bros. (B.C.) Ltd. v. Italpacific Line*, 494 F.2d 934 (2d Cir. 1974).

30. 943 F.2d 220 (2d Cir. 1991), at 223 n.4.

for the review of all contracts it signed on behalf of its principal. It cannot now complain that the terms of the contract it signed "AS AGENT ONLY"on behalf of its principal lacked the necessary protection it now seeks.

CONCLUSION

There is no conflict among the circuits on the issue presented herein. The Fifth Circuit's decision does not conflict with a decision from any state's court of last resort. The Fifth Circuit's decision does not depart from or encourage another court to depart from the accepted and usual course of judicial proceedings. This case satisfies none of the specific criteria established by Rule 10, nor is it of the character of cases contemplated by that Rule. Therefore, Petitioner has failed to establish any basis for this Court to grant *certiorari*.

COGSA establishes the respective rights and obligations of shippers and carriers. It specifically defines carrier as the vessel owner or charterer who enters into a contract of carriage with the shipper. Petitioner was unquestionably not a "carrier" of the subject cargo, since it was neither an owner nor a charterer of the vessel and did not enter into a contract of carriage with the shipper. Therefore, COGSA does not apply to claims against non-carriers like Petitioner.

Aware that the great weight of authority precludes applying COGSA to claims against non-carriers, Petitioner seeks to expand the definition of "carrier", or at least the scope of entities that can benefit from COGSA's carrier defenses and limitations. This Court has already addressed and rejected the arguments Petitioner offers. Petitioner has suggested nothing that warrants such a substantial change in

the Court's interpretation of COGSA; particularly since the protection Petitioner seeks was available to it in the form of a clearly worded Himalaya Clause. Petitioner's failure to ensure that it was protected by such a clause is not a basis for this Court to exercise its discretion to grant *certiorari.*

Respectfully submitted,

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